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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 196.

JOSEPH J. DARLINGTON ET AL., EXECUTORS, APPELLANTS,

vs.

ERLE H. TURNER ET AL., APPELLEES.

BRIEF FOR APPELLEES.

WM. G. JOHNSON,
Counsel for Appellees.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Statement.

The material facts out of which this controversy arises and upon which the correctness of the decree below rests are neither numerous nor complex.

In the year 1871, one Silas H. Turner, a citizen and resident of Fauquier County, Virginia, came to Washington and placed in the hands of one Philip A. Tracy, a resident of the District of Columbia, the sum of twelve thousand dollars for investment in notes, secured on real estate, for Turner's account. Tracy accepted the money and invested it, delivering the notes to Turner. Tracy collected for Turner both principal and interest on the notes and reinvested the same from time to time in other notes. For the purpose of enabling Tracy to collect the interest, Turner's practice was to send the notes to Tracy by mail when interest would fall due, but this practice becoming irksome, all the notes were

redelivered to Tracy by Turner, to hold and collect principal and interest and to reinvest the same, a list of the notes so delivered being retained by Turner. This course of conduct continued until Silas' death (Rec., 15), which occurred on September 21, 1888 (Rec., 106).

On April 30th, 1888, while Tracy was still in possession of the notes, Silas came to Washington and executed his will, which was written for him by said Tracy, who was also one of the attesting witnesses (Rec., pp. 266–7).

The will is in the words and figures following (Rec., p. 265):

> "WASHINGTON, D. C., *April 30, 1888.*
>
> "I hereby give and bequeath to the four children of my brother Thomas M. Turner, of Minden, Louisiana, all property real and personal, owned by me, or in which I have any interest at the time of my death, and appoint Philip A. Tracy to distribute the proceeds of the said property equally between them.
>
> "S. H. TURNER."
>
> "Witnesses:
> "PHILIP A. TRACY,
> "GEORGE G. FENTON."

Subsequently, in August, 1888, Silas Turner became ill, and his brother, Thomas M. Turner, came on from Louisiana, and remained with Silas until the latter's death, on September 21, 1888 (Rec., 106).

Silas Turner was a bachelor, and at the time of his illness and death was boarding with a niece, Mary Rust, on a farm called Moorland, in Fauquier County (Rec., 135–6). The only property Silas had there consisted of a trunk containing his wearing apparel, a watch, fifteen or twenty dollars in money, his will, above referred to, and a list of promissory notes (Rec., pp. 136, 155–6). There were no letters from Tracy, no statements of account, and no evidence of the ownership of any property whatsoever except this list of notes (Rec., p. 136).

This list of notes is described in the record as "Exhibit Erle H. Turner, No. 22" (Rec., pp. 52, 211), and, with the exception of the lead pencil footings, the abbreviation, "am't fr'd," and the memorandum, "This list was given by Mr. Tracy as a list of property of S. H. Turner in his hands," is wholly in the handwriting of Tracy (Rec., pp. 52, 106-7, 288).

This paper is a list of promissory notes, giving their dates, names of makers, and amount of principal of the notes, which aggregate the sum of $28,972.10. It is in the words and figures following (Rec., p. 211) :

EXHIBIT ERLE H. TURNER, No. 22.

"S. H. TURNER.

Nov.	18, '82.	[W. Z. Partello]* *Paid*.....	0,000.00
"	1, '79.	Susan W. McNamee.....	1,700
Jan'y	19, '81.	Edwin F. Jones.....	1,000
April	7, '75.	J. H. Hollidge.....	800
Mar.	22, '84.	John B. Taylor.....	1,000
"	" "	" " "	1,000
July	12, '81.	Flora V. Andrews (2).....	1,000
June	6, '85.	Jeanie J. West.....	3,400
April	3, '85.	Caroline Isdell (2).....	1,335.20
Dec.	15, "	Eliz. V. Lee.....	600
"	" "	" " "	600
Jan'y	8, '86.	Mary J. Lewis (3).....	1,200
Dec.	30, '85.	John L. Carusi.....	1,350
May	19, '86.	Julius Rehwold (4).....	2,200
Dec.	24, '85.	Rufus A. Morrison.....	1,500
Oct.	30, '86.	John B. Avery (4).....	800
"	2, "	Thomas R. Benton (15).....	1,800
June	1, "	G. H. La Fetra.....	1,036.90
April	18, '87.	L. A. Grant.....	300
Aug.	20, '85.	D. B. Groff.....	1,500
		(Footing in lead pencil).....	24,122.10

[*Erased in copy.]

Second Sheet.

1888.	Am't for'd (in lead pencil).....	24,122.10
Feb.	18. C. W. Baldwin.....	2,500
Jan'y	27. A. H. Nixon (3).....	1,350
Mar.	12. D. B. Groff..... ...	1,000
	(Footing in lead pencil).....	$28,972.10

This list was given by Mr. Tracy as a list of the property of S. H. Turner in his hands."

After the death of Silas Turner, Thomas Turner engaged counsel in Virginia, Mr. Eppa Hunton, Jr., and on the 28th of September came to Washington, and in company with Mr. Hunton visited Tracy at the Post-office Department, where he exhibited to Tracy this list of notes. Tracy admitted it was correct; that he had the notes in his possession, and that they were as good as gold (Rec., p. 108). In the same interview Turner told Tracy of Silas' death (Rec., p. 109). Tracy told Turner, in this interview, that he was about to leave the city on his vacation, and when he returned they could meet and have a settlement of the matter, and he gave Turner $439.25 in money, which he said was interest belonging to Silas, which he had just collected, and which he gave to Turner to pay funeral expenses and the like. Thomas Turner then returned to Virginia (Rec., p. 108).

Subsequently, on the 28th of November, 1888, the will of Silas H. Turner was admitted to probate by the Fauquier County Court, in Fauquier County, Virginia, upon the depositions in writing of the subscribing witnesses, the said Philip A. Tracy and George G. Fenton, taken under a commission issued by said court (Rec., pp. 265-268).

In his deposition the said Tracy deposed as follows (Rec., p. 266):

> "3 Q. Was the will of said Silas H. Turner signed by the said Silas H. Turner, or was the will acknowledged by him in the presence of yourself and George G. Fenton and in the presence of Silas H. Turner? A. It was signed by him. *He asked me to write the will for him, which I did*, and he signed it in my presence at my desk, when it was written; we witnessed his will in his presence and in the presence of each other."

No person ever qualified as executor or administrator of Silas H. Turner, at any time.

Thomas M. Turner returned to Washington and met Tracy at the National Hotel on the evening of the 29th of November, 1888, when Tracy handed him a paper (Exhibit T. M. T., No. 1, Rec., p. 220). Tracy then told Turner to examine the paper and see if it would be a satisfactory basis of settlement between them. Turner made no remark at the time, but later, at his leisure, examined the paper, and was dissatisfied with it because of the difference in the notes and in the aggregate amount, in the paper submitted for settlement, and the list of notes found in Silas Turner's possession, identified and admitted to be correct by Tracy on the 28th of September preceding (Rec., pp. 110-11).

The next day, the 30th of November, Turner met Tracy and objected to the proposed settlement because some notes were substituted for those on the original list and because the aggregate amount of the proposed settlement was over $6,000 less than the original list. In response to Turner's objections Tracy informed Turner that he, Tracy, would not qualify as executor; that if Turner attempted to qualify as guardian or administrator Tracy was satisfied that the heirs of Silas in Virginia would contest the will; that there would be a

good deal of cost attached to it; that Turner would have to give a bond in double the amount of the whole estate, which would be difficult for him to do, and that there would be a legacy or inheritance tax which would amount to several thousand dollars, and concluded by stating that, all things taken into consideration, this amount would be more, perhaps, than Turner would get clear if he were to administer on the estate. Tracy then remarked that if Turner would settle as proposed by Tracy he would turn the property over to him without having anybody appointed executor, administrator, or guardian; that the notes could be put in bank here and collected, and Turner could get the amounts away from here as quickly as possible and perhaps prevent the heirs of his brother in Virginia from attempting to break the will. Turner finally agreed to make the settlement on that basis, and Tracy delivered to him the notes mentioned in the proposed settlement, and Turner signed the receipt and delivered it to Tracy (Rec., pp. 111–112; Exhibit T. M. T., No. 2, Rec., pp. 221–2).

This whole paper is in the handwriting of Tracy except the words "Under the will of S. H. Turner, deceased, T. M. Turner, natural tutor and agent for my minor children," the excepted words being in the handwriting of Thomas M. Turner (Rec., pp. 112, 113, 289).

Tracy then paid to Turner $337.64 in cash, which with the sum of $439.25 handed to him by Tracy on September 28, 1888, was all the cash Turner ever received from Tracy at any time (Rec., pp. 113–115).

This receipt, given to Tracy in the settlement, is in the words and figures following (Rec., pp. 221–2:

"Exhibit T. M. T. No. 2."

Full List of Notes and Cash in the Hands of Philip A. Tracy, Belonging to S. H. Turner, Deceased, Nov. 30, '88.

Date of Notes.			
Mar. 22, '84.	Two	notes of John B. Taylor for $1,000 each.....	$2,000.00
May 19, '86.	Two	" " Julius Rehwold for $300 each.....	600.
"	Two	" " Julius Rehwold for $800 each.....	1,600.
April 18, '87.	One	" " Louisa A. Grant....	300.
March 12, '86.	One	" " Diller B. Groff.....	1,500.
" 12, "	One	" " " " "	1,000.
Dec. 15, '85.	Two	" " Eliz. V. Lee, $600 each	1,200.
June 13, '88.	One	" " Roth & Moore.....	325.
Jan'y 19, '81.	One	" " Edwin F. Jones....	1,000.
Feb. 18, '88.	One	" " Charles W. Baldwin.	2,500.
Jan'y 27, "	Three	" " Alban H. Nixon, $450 each	1,350.
July 12, '81.	Two	" " Flora V. Andrews, $500 each.....	1,000.
Oct. 30, '86.	Three	" " John B. Avery, $200 each	600.
" 22, "	Seventeen	" " Thos. H. Benton, $120 each.....	2,040.
Aug. 25, '88.	One	" " Frank W. Paige....	3,000.
Oct. 17, "	Three	" " J. L. Burns, $462.50 each.....	1,387.50
Nov. 6, "	One	" " E. V. Jarvis.....	200.
Nov. 19, "	Two	C. S. McEwen ($600 each)	1,200.
		" lots on Md. Ave. N. E.....	1,800.
Sep. 28,		Cash, T. M. T	439.25
Nov. 30,		" " in full	337.64
(In lead pencil)		(In'st now due) (in lead pencil)...	600.

522

25,379.39 (in lead pencil).

Nov. 30, '88. Received the above-described notes and cash in full under the will of S. H. Turner, deceased.

T. M. TURNER,

Natural Tutor and Agent for My Minor Children.

(In pencil:) Notes all placed in Second national bank by T. M. Turner.

(In pencil:)
25,979.39
840.

26,819.19

Endorsement: (In pencil) List for receipt No. 2. T. M. Turners' receipt for notes belonging to S. H. Turner dec'd. Keep this."

Upon examination it will be seen that the list of notes (Exhibit Erle H. Turner, No. 22) given to Silas Turner by Tracy at the time Silas delivered all his notes to Tracy, and which was found among Silas' papers at his death, contains *forty-eight* notes, aggregating in amount $28,972.10, while the receipt taken from Thomas Turner in November, 1888, after Silas' death, contains *forty-three* notes aggregating only $22,802.50. This difference of *over six thousand dollars* was never paid to Thomas M. Turner by Tracy, but, as both the courts below and the auditor found, upon the evidence, was kept by Tracy and converted to his own use (Rec., pp. 370, 423, 424).

By the terms of Silas' will, written and attested by Tracy, and probated but two days before upon Tracy's testimony, Silas' entire estate was bequeathed to the appellees and Tracy was appointed "to distribute the proceeds equally between them."

By this settlement with Thomas Turner, without the intervention of the courts of Virginia, the domicile of Silas, which had already taken jurisdiction and probated the will, or of this District, the situs of the property, the entire estate was divided between Tracy and Thomas Turner and nothing given to the appellees, the beneficiaries under the will and the equitable owners of the property.

While this division of the estate was being made be-

tween Tracy and Thomas Turner, in violation of the will and of the rights of these appellees, all the appellees were minors, Erle being under twenty, Wilmer under thirteen, Ashby under nine, and Lunette less than six years of age (Rec., 105), and they were living remote from the scene of these transactions, in Minden, Louisiana, where they remained until the father removed the family to Texas in August, 1889 (Rec., p. 37). Thomas Turner was never appointed guardian for his minor children (Rec., p. 118), and, with respect to this fund, dealt with it as his own.

Turner never told his wife nor his children that the children were beneficiaries under Silas' will, but intentionally concealed the facts from them (Rec., pp. 119, 137, 159–160), and he kept all papers relating to the matter private, locked up, and retained the keys (Rec., p. 109).

He deposited the notes and some of the money in the Second National Bank of this city to his own credit. The notes were all paid and the proceeds drawn out by Thomas M. Turner by his checks (Rec., pp. 126, 138, 243, 244, 245).

After depositing the notes in bank, Turner returned to Virginia, spent some time visiting among his relatives there, among whom he expended $2,800 of this fund in gifts (Rec., p. 127), and about Christmas time of 1888 returned to Louisiana, taking with him his sister and his niece, paying the traveling expenses of all three out of this fund. He remained in Louisiana until August, 1889, keeping his sister and niece with him as his guests (Rec., pp. 121, 128, 140).

While in Louisiana he paid some of his individual debts, amounting to $600, and purchased some live stock for $425 out of this fund; he also sent his son Erle to Atlanta, Ga., for medical treatment, for which last item he paid $400 out of the fund (Rec., p. 127).

In August, 1889, he removed to Texas, taking with him his family and his sister and niece, paying the ex-

penses of all out of the fund (Rec., p. 128), and there purchased a lot in the town of Vernon, upon which he erected a house and furnished the same, and also purchased a large farm or wheat ranch of 640 acres, improving, equipping, and stocking the same, paying for these properties out of this fund and taking title in his own name, expending on these ventures $10,550 of this fund (Rec., pp. 127-8).

In June, 1890, he returned to Virginia, bringing with him his family and his sister and niece, all of whose traveling expenses he paid out of the fund (Rec., p. 128), but leaving Erle in charge of the wheat ranch under an agreement whereby Erle was to remain there, attend to the business of seeing the house built, the improvements made on the farm, and the putting in and harvesting of the wheat crops, and in consideration of said services Erle was to receive one-half interest in the first two crops of wheat raised on the place (Rec., p. 121).

Thomas M. Turner remained in Virginia, engaging in no business and earning nothing until April of 1891, when Erle Turner came east, met his father in Washington, where they had a settlement with respect to Erle Turner's services in the conduct of the wheat ranch and also of an indebtedness of Thomas M. Turner to Erle Turner which had existed prior to the death of Silas Turner (Rec., pp. 44, 53, 56, 57, 121–123).

As a result of this settlement Thomas Turner paid to his son twelve hundred dollars in money and delivered to him two notes, aggregating five hundred and twenty-five dollars, out of the fund received from Tracy. The two wheat crops of which Erle was to have one-half, yielded $3,900 (Rec., pp. 53, 54, 121–123), so that the settlement, though accepted by Erle, was less than his share. Thereupon Erle Turner went to Philadelphia, where he has since resided.

On the 28th of February, 1891, the last of the notes delivered by Tracy to Thomas M. Turner was paid at the bank (Rec., p. 245), and by the 19th of May, 1891, Turner had withdrawn the last dollar from the bank and overdrawn the account $27.34 (Rec., p. 245).

In the fall of 1890, Wilmer Turner, the eldest daughter, who was born October 11, 1875 (Rec., 37), and was then nearly fifteen years old, was sent to Hollins Institute to school, remaining there one year, and in 1891 she was sent to Kleinberg Schools remaining there three years, and in the fall of 1894 began teaching (Rec., pp. 38, 381-4).

She visited the family in June, 1895, at Vernon, Texas, and remained there until September, 1896, when she returned to Virginia to resume teaching, taking a position as teacher in the family of a Mr. Foster, in Nelson County, at one hundred dollars a year, and continuously from that time until after the bringing of this suit remained in Virginia, teaching at different places, her highest salary being $175 per year in the year 1899 (Rec., pp. 39, 186).

From 1893 on, Thomas M. Turner met with ill success in his Texas venture, became involved in debt, judgment was obtained against him, he was unable to pay the liens and taxes which had accrued on the real estate which he had bought, and the entire property was sacrificed (Rec., pp. 126, 128), so that by September, 1896, when Wilmer returned to Virginia to resume teaching, he and his family were in destitute circumstances, Wilmer Turner slightly aiding the family out of the savings from her pitiful earnings as a teacher in Virginia (Rec., p. 186, 385).

Wilmer never saw her father from September, 1896, until May, 1901, when he came to Washington to testify in this cause (Rec., pp. 42, 128).

From the time of leaving Texas in September, 1896, up to the time she testified before the auditor, Novem-

ber, 1903, she had not seen her mother nor Ashby and Lunette (Rec., 390-1).

During all this time Wilmer and Erle Turner supported themselves without any assistance whatever from their father, but Wilmer extended some financial aid to her father and mother and the two younger children in Texas (Rec., pp. 39, 123, 186, 188, 190, 385-6).

When Erle Turner came to Washington in 1891, with his father, the latter introduced him to Tracy, and he and Tracy subsequently had interviews and corresponded with each other. The correspondence, so far as it was preserved and could be discovered, is found in the record. During this time Tracy made frequent payments to Erle Turner, in varying sums, taking receipts therefor, all specifying that the money is paid from the estate of Silas H. Turner (Rec., pp. 212, 213), and one of which, dated May 7, 1897, is in the handwriting of Tracy (Rec., pp. 288-9).

The correspondence between Erle Turner and Tracy, though more or less irregular, continued up to May, 1898 (Rec., pp. 49, 202-8).

Subsequently Erle H. Turner wrote to Tracy requesting some money and received a letter from the defendant, J. J. Darlington, Esq., informing him that Mr. Tracy was dead. After some further communication by mail and telegraph with Mr. Darlington, Erle H. Turner came to Washington and called upon Mr. Darlington, who was absent from his office (Rec., pp. 50, 51, 357-8). Erle then called upon William E. Edmonston, Esq., who took him to the register of wills' office, showing him the will of Tracy, advised him to consult counsel, and brought him to the office of the counsel who filed this bill in his behalf (Rec., pp. 50, 194-5).

Erle, as a result of his interview with counsel, wrote to his father requesting him to send any papers which would throw any light upon this matter (Rec., pp. 52,

124), and also communicated with his sister, Wilmer, who was then teaching at Dr. Parson's at Massie's Mill, Virginia, and who came to Washington to consult counsel with him (Rec., pp. 67, 184).

As a result of the correspondence between Erle and his father he received a copy of the will of Silas H. Turner, in the handwriting of Eppa Hunton, jr. (Rec., p. 107), the original list of the notes given by Tracy to Silas H. Turner, and the envelope bearing the endorsement "Notes belonging to S. H. Turner, 1888" (Rec., pp. 52, 109).

This was the first information that either Erle or Wilmer had as to the terms and contents of the will or as to the amount and character of the estate left by Silas H. Turner (Rec., pp. 65, 184, 189, 190).

Ashby Turner, then in his nineteenth year, and Lunette Turner, then in her sixteenth year, were at this time (1898) with their parents in Texas, and remained with them until after the bringing of this suit (Rec., p. 391).

On September 21, 1898, the claim of the appellees was brought to the attention of the executors (Rec., pp. 268–9), and on October 28, 1898, the executors notified counsel that they could not acknowledge its validity and were compelled to reject it (Rec., p. 269).

Thereupon this suit was brought June 10, 1899 (Rec., p. 1).

From the foregoing it is seen that Tracy had for years been in possession and absolute control of Silas Turner's estate, and while in such control wrote and witnessed the execution of Silas' will, whereby the estate was bequeathed to these children, and he was appointed to distribute it among them. While still in possession of the estate, he is informed of Silas' death, and while yet retaining that possession is cognizant of the probate of the will which he had himself written, and which was probated upon his own testimony as to its due execution. Within two days after that judicial act, and with

full knowledge that no executor or administrator had qualified, he divides the entire estate between Thomas Turner and himself, in utter disregard and defiance of the provisions of the will and of the rights of the beneficiaries under the will. That Tracy was conscious of his wrong-doing in this regard, and feared the consequent liability therefor, is demonstrated by his own declarations proved in the record. With the answer of the appellants is filed a written statement left by Tracy for the information of his executors, giving his account of this transaction (Rec., pp. 15-16). Before preparing that statement, however, he had consulted counsel, and had been advised of the invalidity of his acts. In a letter written by him, on August 21, 1894, to Mrs. Turner, the mother of the appellees, Tracy says (Rec., p. 201):

> "I became alarmed and consulted a lawyer, and he advised me not to turn over another dollar of the estate money until Mr. Turner qualified for the full amount of the estate."

Some time between January and March, 1898, he carefully prepared a written statement of this entire transaction, which was found among his papers after his death (Rec., pp. 15–16, 293–4, 295–9).

In that statement, after detailing the origin and course of his trusteeship during the life of Silas Turner (Rec., p. 15), as hereinbefore detailed, he gives the following account of his dealings with the trust fund after Silas' death (Rec., p. 15):

> "This condition continued until 1888, when he died in Virginia *leaving his entire estate to the three minor children* of his brother then living in Louisiana. In his will he *named me to settle up the estate and divide the money among the children;* but, as the laws of Virginia require two witnesses to a will and says neither of them shall be an executor I could not qualify, and *as the father*

> if appointed *could not have given the bond*, I handed him the package of notes, advised him to deposit them in the Second National Bank of Washington, D. C., which, he did, and agreed to look after them and have them all paid, he being out of the city."

The only reasons suggested, in this extraordinary statement, for ignoring the courts and delivering the estate to an irresponsible and unauthorized person, is the erroneously supposed legal disqualification of himself to act as executor, and the inability of the one to whom he did deliver the bulk of the estate to comply with the requirements of law.

Upon these facts Mr. Justice Hagner, who heard the case at special term, in an opinion filed in the cause, in which he considered and decided all the defenses made in behalf of Tracy's estate (Rec., pp. 26–33), held that Tracy was trustee for the appellees under the will of Silas Turner, as to all the estate of Silas coming into his hands; that as such he and his executors were accountable to them therefor, and that the payment to Thomas Turner was a breach of trust and void. He also held that Tracy's estate was entitled, in such an accounting, to credit for all payments made by him to Erle Turner and also, by way of subrogation, to all applications of the fund made by Thomas Turner for the benefit of the children, and for the purpose of establishing such credits allowed the appellants to take further testimony before the auditor.

A decree was entered in conformity with this opinion (Rec., pp. 25-26), and the cause was then heard before the auditor, who allowed all the credits claimed except a payment to Erle Turner of $1,200 (Rec., p. 371), which was allowed by the court below in the modification of the decree (Rec., pp. 424–5).

ARGUMENT.

There are fifteen errors assigned against the decree in this cause, but the substance of them may be reduced to a few general propositions:

1. That the bill should have been dismissed because of a variance between the pleadings and proof.

2. That the court of equity was without jurisdiction, because the relation of Tracy to the appellees was not one of *trust*, and the remedy, if any, was by proceeding at law.

3. That the payment by Tracy to Thomas Turner was valid and a discharge *pro tanto*.

4. That two of the appellees were barred by reason of laches and acquiescence.

5. That the auditor erred in the accounting: (*a*) In the basis of the primary charge against Tracy's estate; (*b*) In charging Tracy's estate with interest.

I.

The Case is One of Equitable Jurisdiction.

The question of the jurisdiction of equity lies at the threshold of the case, of course, and no matter how meritorious the claim of the appellees, if it was not one of equitable cognizance, the bill should have been dismissed. It seems proper, therefore, that that question should be first considered.

In the discussion of this question appellants entirely ignore the true situation of Tracy as to the fund.

It is to be observed that the fund was given to Tracy in the first instance for investment and was delivered to him in the form of money; that subsequently negotiable notes, representing the investment, were delivered to him, with the power to invest and reinvest at his discretion, which he did. Silas Turner retained no control over the property and no evidence of his title to it beyond the

bare list of the notes delivered, while Tracy was at liberty to change the identity of the trust fund from time to time in his discretion, and, as the evidence shows, he actually did so. By the form which the property took, the legal title to it became vested in the holder, and Silas Turner became the beneficial and equitable owner, his acquiescence and concurrence being in nowise necessary to enable Tracy to transfer the title of any of the property to a stranger.

It is undoubtedly true that Silas Turner in his lifetime might have maintained an action at law for the return of the specific notes if in Tracy's possession, or for their value in an action of account; but had such a proceeding been necessary it is manifest that an essential aid to Silas' proper protection would have been discovery from Tracy as to the course of his procedure with regard to the fund. An action at law would not have afforded him such discovery, and, independently of the special confidence reposed in Tracy and his dominion and control over the fund, the right to discovery and account alone would have sustained the jurisdiction of equity in his case.

With respect to the appellees, however, no action at law was maintainable, for there was no privity between them and Tracy. Tracy did not receive the fund from them, nor were they the legal representatives of Silas Turner, and with respect to an action against Tracy after the death of Silas appellants say in their brief (page 51) that the—

> "remedy of complainants was and is a suit at law to be *brought by an administrator with the will annexed of Silas Turner.*"

Appellees are not administrators with the will annexed of Silas Turner, and an administrator with the will annexed of Silas Turner would not be the appellees, and if

such administrator would have had a full, adequate, and complete remedy at law that is no answer to the appellees, who sue in their own right. There being no privity between them and Tracy, they could have maintained no such action at law, while their right to a full discovery and to compel the execution of the trust created by Silas Turner for their benefit creates the fullest jurisdiction in a court of equity to administer the relief sought in this action.

It is also said in the appellant's brief (p. 50) that the—

> "Will did not make Tracy executor, nor did it, in terms, make him a *trustee. No trust was created by the will.* Tracy did not thereby acquire the *legal title* to Turner's property in his hands; he was given *no power of investment or control over the property.*"

The list of notes included in the receipt which Tracy took from Thomas Turner (Rec., pp. 17, 221) shows, however, that on October 17, 1888, after Tracy knew of Silas' death, he assumed to *invest* $1,387.50 of Silas' money in the notes of one J. L. Burns; that on the following 6th of November, he assumed to invest $200 of the estate in the note of one E. V. Jarvis, and on the 19th of November following, he assumed to invest $1,200 in the notes of one C. S. McEwen. If "no trust was created by the will," and "no power of investment or control over the property" given to him, how was he able to invest $2,787.50 of the estate's money in these six notes?

It is respectfully submitted that, apart from all other considerations, these acts alone constituted an acceptance of the trust under the will, and these investments were made and could only be made by him in his character as trustee under the will and for the benefit of the legatees therein named.

With reference to this objection, Mr. Justice Hagner, in his opinion in the special term, says (Rec., p. 27):

> "1. The first objection interposed by the executors is that their testator, Tracy, could not be held accountable in equity, *as trustee*, with respect to the funds that came into his hands as the property of Silas Turner, and that Tracy received and held them only as *the agent* of Silas Turner, and therefore that whatever remedy against the estate of Tracy might be had, must be pursued in a court of law.
>
> "I consider this contention as untenable. The testimony as to the entire course of the dealings between Silas Turner and Tracy sufficiently establishes that their relations throughout were those of trustee and *cestui que trust;* and this relation is recognized in the testimony, and established as between Tracy and the children of Thomas M. Turner, in the words of the bequest in Silas Turner's will, which declares:
>
> "'I hereby give and bequeath to the four children of my brother, Thomas M. Turner, of Minden, Louisiana, all property, real and personal, owned by me or in which I have any interest at the time of my death, and appoint Philip A. Tracy to distribute the proceeds of said property equally between them.'
>
> "Tracy's own statement in his instructions to his executors is a sufficient recognition of his fiduciary character with respect to the fund; and his conduct after the death of Silas showed a recognition of his character, as trustee with respect to the property.
>
> "Under these conditions, the familiar principle applies that whoever receives property or money to be paid to another, or to be applied to a particular purpose, is answerable as a trustee, and may be sued at law or in equity if he does not apply it accordingly. Taylor *vs.* Benham, 5 How., 233; Inglis *vs.* Snug Harbor, 3 Peters, 99; Hinkle *vs.* Wanzer *et al.*, 17th Howard, 353.

"The peculiar propriety of recourse to equity for the settlement of the entire controversy in such a case in one suit is fully recognized by the authorities. 1st Story's Equity Jurisprudence, secs. 461 to 465."

The Court of Appeals, in its opinion upon this branch of the case, says (Rec., pp. 422–3):

"We have no doubt of the jurisdiction of a court of equity in this case. The relations between Tracy and Silas H. Turner, even, were not those of debtor and creditor merely, at the time of the delivery by the former to the latter of the list of notes held for collection and reinvestment of the proceeds. The notes were so indorsed that Tracy could collect not only interest but principal also and reinvest the same; and before Silas Turner's death it appears that he had invested some of the money in land the title to which was in his own name. While Silas Turner might have had a remedy at law against Tracy for the proceeds of the fund, we are not prepared to say that he would not have had a right to resort to equity for a complete accounting and the recovery of the proceeds and profits of the fund when ascertained thereby had a settlement been refused him. However this may be, the relations between Tracy and the complainants, as legatees of Silas H. Turner, were those of trustees and cestuis que trust. By the terms of the will he was expressly charged with the distribution of the fund in his possession among the four complainants. McKee *vs.* Lamon, 159 U. S., 317, 322; Cleeves *vs.* Jamison, 182 U. S., 461, 479, 480, and cases cited.

"Moreover, part of the fund, as we have seen, had been invested in lands along with Tracy's own money, the title to which was in his name. His correspondence with Erle Turner, and occasional payments to him, and the recitals of the paper prepared for his executors, show that Tracy regarded himself as a trustee of the complainants in respect of that part of the fund."

A number of decisions in the State courts are cited by appellants as being adverse to the claim of jurisdiction in this cause, among them the case of Doyle *vs.* Murphy, 22 Ill., 502, which is claimed to be "almost exactly similar to this case" (Brief, p. 51).

The dissimilarities of that case, however, are quite marked. In the first place, the fund was not deposited by Catherine Byrnes with Doyle upon confidence to invest and manage for her, but was placed in a repository in Doyle's possession and there locked up, Catherine Byrnes retaining the key. Doyle obtained possession of the property by *securing a false key*, unlocking the repository and *stealing* the bonds, and the action was not brought by a *legatee* under Catherine Byrnes' will, but by her *executrix*.

It is not necessary, however, to examine into the cases cited from the different State courts. The rule in this jurisdiction is controlled by the decisions of this, which are uniform to the effect that where one receives money or property from a person to apply it to the uses of a third person not a party to the transaction, a trust is thereby created of which equity has jurisdiction.

In McKee *vs.* Lamon, 159 U. S., 317, Mr. Justice Brown, speaking for this court says (p. 322):

> "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. Taylor *vs.* Benham, 5 How., 233, 274; Kane *vs.* Bloodgood, 7 Johns. Ch. 90, 110; Barings *vs.* Dabney, 19 Wall, 1; National Bank *vs.* Insurance Co., 104 U. S., 54; Keller *vs.* Ashford, 133 U. S., 610; Union Life Insurance Co. *vs.* Hanford, 143 U. S., 187; Ryan *vs.* Dox, 34 N.

> Y., 307; Story's Equity Jurisprudence, secs. 1041, 1255; Mechem on Agency, sec. 568. And in enforcing such trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the fund."

In Taylor et al. *vs.* Benham, 5 How., 233, Mr. Justice Woodbury delivering the opinion of this court says (p. 274):

> "So, 'every person who receives money to be paid to another; or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust.' Kane *vs.* Bloodgood, 7 Johns. Ch., 110; Scott *vs.* Surman, Willes, 404; Shakeshaft's Case, 3 Bro., Ch. Cas., 198."

In Keller *vs.* Ashford, 133 U. S., 610, where the claim was founded upon a covenant in the deed to pay the debt of another, Mr. Justice Gray, speaking for the court says (p. 620):

> "Upon the question whether the mortgagee could sue at law, there is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not."

And further (p. 621):

> "In the case at bar, the promise of Ashford was to Thompson and not to the mortgagees and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore that

Thompson only could maintain an action at law upon that promise.

"In equity, as at law, the contract of the purchaser to pay the mortgage being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. Parsons *vs.* Freeman, 2 P. Wms., 664, note; S. C. Ambler, 115; Oxford *vs.* Rodney, 14 Ves., 417, 424; In re Empress Engineering Co., 16 Ch. D., 125; Gandy *vs.* Gandy, 30 Ch. D., 57, 67.

"But it has been held by many State courts of high authority, in accordance with the suggestion of Lord Hardwicke in Parsons *vs.* Freeman, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser."

In Clews *vs.* Jamieson, 182 U. S., 461, the court considers this subject at length, and Mr. Justice Peckham, delivering the opinion, says (pages 479-80):

"Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume one, at section 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice; good faith, and good conscience; and it has been extended so as to embrace not only lands but chattels; funds of every kind, things in action and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief

demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character and of a kind which the law courts can not administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the cestui que trust, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the cestui que trust, consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' 1 Pom. Eq. Jur., sec. 158.

"In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged. 1 Pom. Eq. Jur., sec. 157."

Whatever may be the rule in other jurisdictions, it is seen to be the settled rule here that the jurisdiction of equity extends to cases of this description.

II.

There is No Variance Between the Allegations and Proofs.

Appellants contend that the bill of complaint should have been dismissed because of an alleged fatal variance between the pleading and the proof.

This branch of appellant's argument is contained in pages 32 to 45 of the brief, and it is important to notice, at the outset, that it is not claimed that the bill fails to allege any facts material to the relief prayed and granted or that there is a failure to prove such facts. The complaint is that bill alleges *more* than is necessary to support the prayers for relief. This will be apparent upon examination of the criticisms made in the brief in connection with the pleadings.

The alleged fatal variance is said to consist in this: That the sixth paragraph of the bill alleges that Tracy continued in possession of the entire estate of Silas Turner up to his death, and that the tenth paragraph of the bill alleges that the entire trust fund, principal and interest and profits, came into the possession of the defendants as executors; whereas, in fact, the evidence shows that a very large portion of the trust estate was delivered to Thomas Turner, the father of appellees, in the lifetime of Tracy.

In order to make it appear that these isolated averments in the bill are essential and material and constitute the gravamen of the proceeding, it is claimed by appellants that (brief, pp. 32–3):

> "The *primary object* of the bill was to impress the fund in the hands of the appellants with the trusts in favor of the complainants, appellees herein, on the ground that the trust fund had been followed and specifically traced into the hands of these defendants, the executors of Philip A. Tracy."

This is an utter misconception of the scope and character of the bill and entirely unsupported by any of its averments. There is not a single allegation in the bill, from beginning to end, to the effect that the fund held by the executors is the *same fund* which Tracy derived from Silas Turner or the *product of that fund.*

Nor is the court asked to decree that the funds, or any part of them, in the hands of the executors of Tracy are the trust estate of Turner or the product of his estate or that there is any identity between the two trust funds. Nor is the court asked to impress the trust created by Turner's will upon the estate in the hands of the defendants.

In endeavoring to maintain this technical defense against the appellees' meritorious right of recovery, appellants entirely ignore all the other allegations of the bill and its real scope and purpose as indicated by the prayers for relief, and it is respectfully submitted that upon reading the bill it will be plainly seen that the two isolated passages are entirely immaterial and irrelevant to the main allegations and grounds of relief shown in the bill and the specific relief asked by its prayers.

The Allegations of the Bill.

The substantial averments of the bill are that in, and prior to, April, 1888, Tracy was the confidential agent and trustee of Silas Turner and as such entrusted with large sums of money for investment; that on the 30th of April, 1888, Tracy prepared a will for Silas Turner bequeathing the said property to the complainants and appointing Tracy to distribute the proceeds among them; that Silas died in September, 1888, and that the will was probated in November, 1888.

The sixth paragraph then alleges that the will named no executor and that no person was ever appointed administrator of the estate of Silas; that at the time of the writing and execution of the will, and continuously thereafter, and at the time of the death of Silas, and continuously thereafter, up to the death of Tracy, Tracy was, and continued to be, in possession of the entire trust estate of Silas H. Turner, which consisted at the

time of the death of Silas of promissory notes secured upon real estate, amounting in the aggregate to about $30,000.

That shortly before Silas' death Tracy gave him a memorandum or list describing the property of which he had possession, which list is set out in the bill, and that the notes mentioned therein were good and collectible, and were actually paid after the death of Silas; that the—

> "complainants have no means of knowing what disposition the said Philip A. Tracy made of the funds arising from the payment of the said notes and interest, and they are advised and believe and therefore charge that they are entitled to have from the said defendants a full discovery as to the disposition made by the said Tracy of the said funds." (Rec., p. 4).

That after the death of Silas, Tracy acknowledged to Thomas M. Turner the possession of the said notes, and that they were all good; that Tracy never at any time distributed the proceeds of said property among the complainants, as required by the will, nor did he at any time pay over the same to any one legally entitled thereto, except at divers times he paid small sums to the complainant Erle, aggregating about $1,400, for which the complainants admit his estate is entitled to credit.

The tenth paragraph then alleges that Tracy never at any time rendered any accounts to them, or to any one for them, as to his doings as trustee, or as to the investments he made of the fund committed to him, or of the proceeds arising therefrom; that he never paid over to the complainants any part of the said estate, save the payments above mentioned to Erle, but retained in his possession, down to his death, the entire trust fund, principal, interest, and profits, and the same have come into the possession of the defendants as executors; that during all the time prior to the death of Silas Turner

and the death of Tracy, Tracy acknowledged possession of the trust fund and of his trusteeship thereof.

That Tracy died in July, 1888, leaving a last will, and appointed the defendants his executors; that the will had been admitted to probate, and the executors had qualified; that in September, 1898, the defendants, as executors, were called upon for an accounting and distribution of the estate of Silas, and declined to recognize the right of complainants to an account and distribution of the fund; that they are informed by the defendants that Tracy left written instructions to his executors to oppose any claim of the complainants, and in such instructions denied that he was trustee of the fund, and that he ever had any of the funds of Silas Turner in his possession or control *after the death of Silas.* And the executors are called upon to discover the said alleged instructions.

The other allegations of the bill explain the situation of the complainants, their lack of knowledge and means of knowledge of the facts relating to their rights, and of the reason for not having before instituted proceedings.

Though the bill alleges possession by Tracy down to his death and by his executors thereafter, *no legal liability is alleged nor demand made against his estate by reason of such possession,* but the entire case of appellees is based upon and *limited* to *Tracy's* possession under the conditions alleged, *down to the death of Silas Turner,* and of his failure to account thereafter, and there is not a suggestion of any claim of right against the appellants or their testator by reason of the continued possession of the fund after Silas Turner's death.

The Prayers of the Bill and the Relief Sought.

The first prayer of the bill is for process; the second prayer is that the defendants make full discovery as to the said written instructions left by Tracy to his execu-

tors; the third prayer is that Tracy be adjudged to have been, from the death of Silas to the time of Tracy's death, the trustee of the complainants under the will of Silas as to the whole estate of Silas, and particularly as to the promissory notes mentioned in the bill; that as such trustee Tracy is accountable for said trust fund during his life and that the executors are accountable for the same since his death; the fourth prayer is that the defendants make full and complete discovery as to what disposition was made by Tracy of the particular notes in the bill mentioned and the interest; the fifth prayer is that they make discovery as to what proceeds were realized from any disposition of the notes, and how the proceeds were used and invested, and what profits, if any, were realized, and what disposition was made of the profits; the sixth prayer is that the defendants be required to account for the amount of the notes in the bill mentioned, together with interest thereon, and the proceeds thereof, and profits realized from the use and investment of the proceeds, together with interest on all said money *from the 21st of September, 1888;* the seventh prayer is that the defendants be decreed to pay over to the complainants the total amount of the trust estate to which they may be found entitled on a proper accounting, together with all interest and profits realized therefrom; the eighth prayer is for general relief.

Thus the court will see that while in the sixth and tenth paragraphs it is alleged, among other things, that Tracy retained possession of the trust fund down to his death, and that the same had passed to his executors, *no relief sought by any of the prayers is based on these allegations, nor are these allegations necessary to sustain any of the relief which is sought.*

The immateriality of these averments to the case made by the bill is strikingly pointed and emphasized by the fact that whereas the third prayer of the bill

prays that Tracy may be adjudged to have been from the death of Silas to his own death trustee for the complainants, it does not pray that the executors, defendants to the bill, be decreed to be such trustees in succession of Tracy as to the trust fund in their hands or in any other particular whatsoever. The only exaction made of the defendants, by any of the prayers is for discovery, accounting and payment of such sum as, upon accounting, may be found to be due. And in such accounting they *limit the capitalization* of the trust fund to the *21st of September, 1888, the date of Silas' death* and claim simple interest on the fund *from that date* (Rec., p. 9).

The claim made to the profits realized from the sale in February, 1890, of the Maryland avenue lots, is not a departure from nor inconsistent with this restricted view of the bill and its prayers, as appellants claim in their brief (p. 41).

That investment was made in Silas' lifetime on the 3d of September, 1888 (Rec., p. 350), and was a pending and uncompleted investment at the time of his death.

Thus the court will see that the bill nowhere attempts to trace the trust fund into the hands of the executors, to impress anything in their hands with the trust, or even to charge them as trustees in succession of Tracy. And the characterization of the bill by appellants that its object was to impress the fund in the hands of the defendants with trusts in favor of the complainants is absolutely without foundation.

The bill is one calling for discovery and accounting from the executors of a deceased trustee who had failed to account and pay over the trust fund in his lifetime. No other relief is sought, and all the allegations pertinent and essential to *that* relief are plainly found in the bill.

The Authorities Cited by Appellants Are Without Application.

It is not deemed necessary to go into an extended analysis of the cases cited in appellants' brief to the effect that the proofs must be *secundum allegata*. The rule is too well established, both at law and in equity, and is founded upon such obvious considerations of reason and justice that it would be idle to attempt to combat it. But attention may be called to the fact that an examination of the cases cited will show that they were all cases in which the proofs offered not only failed to establish the cases made in the bills, but that there were no allegations appropriate to the proof offered and the relief sought was not germane to the case made in the proof.

None of the cases cited decide that an irrelevant and immaterial averment is fatal to the proceeding where all relevant and substantial averments essential to the relief prayed are made in the bill and supported by the proofs as here.

The Issue Made by the Pleadings Was Not Changed by the Proof.

Appellants further contend (brief, p. 34):

> "The distinct issue raised by the bill and answer and replication is: Did this fund continue in Tracy's possession up to the time of his death and come into the hands of the defendants as executors?
>
> "On the other hand, the distinct issue raised by the testimony and in the argument on the final hearing in respect of the bulk of the trust fund is: Was the payment made by Tracy to Turner as natural tutor and guardian of his minor children a valid discharge *pro tanto* to Tracy?"

It is respectfully submitted that this first issue was not raised by the pleadings and would not have been

raised by the pleadings in any proceeding and of itself would have been a *non sequitur*. Tracy's accountability, if he had any, was precisely the same whether the fund remained in his possession and that of the executors, or had passed to a stranger. *The measure of relief* and the *specific property* to which that relief could extend might be affected by the identification of the trust fund in the hands of his executors, but his liability to account and to pay what was found due would be the same in each instance.

It is true that the question of the validity of the payment to Thomas Turner became an issue in the cause, but that was not because of any imperfection in the bill, but because in answer to the discovery sought by the bill the defendants alleged in defense and discharge the said payment to Thomas Turner; and it is not understood that appellants contend that an allegation of an *illegal* and *void* payment could have been a defense in any proceeding, no matter what the scope of the bill.

Even if the Allegations Complained of Were Material They Are Supported by Proof.

If the isolated allegations of the bill upon which appellants' counsel attempt to hang the fate of this case were as essential as they suppose, there is not such a failure of evidence to support such allegations as is claimed by appellants' counsel.

On the contrary, the proof is that a very substantial part of the identical trust fund never was turned over by Tracy to Thomas Turner, but that it remained in the hands of Tracy down to the time of his death, and as a presumption of law passed to his executors.

Of the specifics constituting the trust fund, delivered by Silas Turner to Tracy, twelve of the notes, aggregating $12,522.10, were never delivered to Thomas Turner, while $1,800 in money invested in land, realizing $3,069.25

in February, 1890, was never turned over to Thomas Turner. This fund, with whatever profits its subsequent investment realized, remained in Tracy's possession down to the time of his death, and in contemplation of law passed to his executors.

Not only this, but if, as appellees contend, the payment to Thomas Turner was void, it constituted no dispossession of the trust fund by Tracy, Thomas Turner becoming thereby the agent of Tracy, and his possession was Tracy's possession.

Such is the ruling of the court in the case of Perry *vs.* Carmichael, 95 Ill., 519, in which the court says (p. 530):

> "The money, by his acquiescence, was placed in the hands of Marshall H. Regan. It was the complainant's money—a trust fund—and they were minors. *The acts of Regan in this regard must be considered the acts of Perry, as between complainants and himself*, and Perry thereby became bound to see to it that this portion of the fund should be placed in their hands or in the hands of their lawful guardian. . . . In equity he stood as surety to these children that the trust thus assumed by Regan would be faithfully fulfilled. . . . The mere fact that Regan assumed the trust (not being lawfully authorized to do so) did not relieve Perry from his responsibility."

In a labored effort to show that they have been in some wise prejudiced by the alleged variance between the pleadings and proof, appellants claim that the effect of the pleading was to cast upon them the burden of proving that the payment to Thomas Turner by Tracy was a valid discharge (Brf., p. 43).

As the only possible revelancy of the payment by Tracy to Thomas Turner in any form of proceeding, either at law or in equity, was by way of discharge, and as the defense of discharge is always a defense by way of confession and avoidance, it is difficult to conceive

upon what principle the burden of proving the validity of the payment could ever rest elsewhere than on him who pleads the payment.

A payment unless valid is no discharge, and to make a valid plea of payment it is essential to aver all the elements of validity in the payment and prove them affirmatively.

The position of the appellants is that they could plead as a defense a mere payment without showing by pleading or evidence its validity, and that thereupon the burden would shift to their adversaries both to allege and prove its invalidity, which, it is submitted, is a *reductio ad absurdum*.

If the payment was valid it is a discharge *pro tanto*, and the appellants have the benefit of it in the case. If, as appellees claim, it was void *in law*, then it is a mere nullity, which they had the right to disregard.

Piersoll *vs.* Elliott, 6 Pet., 95, 97-8.

In answering this objection, made at the hearing in special term, Mr. Justice Hagner, in his opinion, thus points the true scope and purpose of the bill (Rec., p. 27):

> "The further contention of the defendants is that as none of the specifics described and enumerated in the list given by Tracy to Silas Turner ever came *nominatim* into the hands of his executors, therefore no decree can pass in respect to those specifics or their value in the present case, as against the estate of a culpable trustee. *But the present suit is not brought to recover the specific bonds or properties named in the list*, as in an action of replevin or trover; but to *compel an accounting by the executors, of their testator's dealings with the funds*, in which they may be charged with the value of the property so held by Tracy which has not been properly accounted for by him or by his estate; and be credited with all proper payments made by Tracy to persons justly entitled to receive them."

And it is thus disposed of by the Court of Appeals (Rec., p. 422):

> "The first assignment of error is that the bill should have been dismissed because of a fatal variance between the allegations thereof and the proofs.
>
> "The contention is that *the primary object of the bill* is to impress the fund in the hands of the defendants with a trust, on the ground that the trust fund had been specifically traced into their possession as executors of Tracy. We *can not concur in this limitation of the object and scope of the bill. In our opinion its allegations are sufficient to warrant the consideration of all of the evidence* and the entry of the decree in accordance therewith."

Counsel for appellants, in their brief (Brf., pp. 43-5), contend that these expressions of opinion by the courts below do not meet their contention, tersely stated, that proof that the fund did *not* come into possession of the executors will not support an allegation that it *did* so come into their possession (Brf., pp. 44-45), with which all will agree.

But it is respectfully submitted that the opinions of the two courts below do meet directly the real question involved in this objection, namely, the fair and reasonable interpretation of the object and scope of the bill and the *materiality* of the allegations objected to, to the relief prayed and granted.

The allegations of the bill and the prayers for relief plainly show that its only purpose was to require a discovery and accounting by the executors of Tracy, trustee, of his doings with the trust estate, down to the death of Silas Turner, and the payment to them of the fund thus established with interest from that date (Rec., p. 9); that all allegations appropriate to that relief are made and

supported by evidence, and that the decree in the cause is limited to that same relief.

It is respectfully submitted that the courts below were right in overruling this objection; that the same is without merit, and that no injury to appellants of any sort from the supposed variance is shown or suggested.

III.

The Payment by Tracy to Thomas Turner Null and Void.

It is conceded that the property in controversy belonged to Silas Turner and that he bequeathed it to the appellees by a valid and regularly probated last will, which directed Tracy to distribute it equally among the appellees. That the terms of this will and the fact of its probate were known to Tracy can not be disputed, since he wrote the will and by his testimony established it in the Virginia court. It is also a conceded fact that at the time of Silas' death and at the time of the probate of the will, Tracy was still in possession of Silas' estate, and that he never distributed it among the appellees, as provided by the will, but that he paid a large portion of it to their father. This, it is submitted, was null and void so far as the appellees are concerned, because a payment to any one other than the party entitled or to his agent is no payment in law. Agency can only arise by contract or operation of law. The appellees made no such contract and could make none, because they were all minors and he had never been appointed their guardian (Rec., p. 118), and his only relation to them was the natural one of father.

Payment to a Father No Discharge at Common Law.

It is submitted that the law is well settled that the fact that Thomas M. Turner was the father of the com-

plainants is immaterial, and that the delivery to him is no better than to an utter stranger.

In the case of Dagley *vs.* Tolferry, 1 P. Wms., 285, decided in 1715, the testator left one hundred pounds apiece to the infant children of his sister, mentioning no time of payment, and appointing the defendant executor:

> "It was proved in the cause that *the testator*, on his deathbed, *gave directions that the executor should pay these legacies to the father of the infants that he might improve the money for their benefit.*"

The executor actually paid these four legacies to the father. Afterwards the executor was sued for the legacy by the assignee of one of the legatees (p. 286)—

> "and had a decree for the same, in regard to the payment of the legacy to the father and guardian was ill. And this decree being made by Sir John Trevor, Master of the Rolls, an appeal was brought before Lord Chancellor Cowper, who affirmed the decree, for that (as he said) if the same were reversed it might encourage payments to parents and guardians in wrong of infant children; but it was thought a hard case and the deposit ordered to be divided."

In the case of Cooper *vs.* Thornton, 3 Brown's Ch. Cases, 96, the decision in Dagley *vs.* Tolferry, *supra*, is approved, the court saying (p. 97):

> "The only question then is whether the payment to the father is a sufficient bar to the demand made by the plaintiffs. It is argued on the part of the plaintiffs that the payment to the father of legacies given to his children who are not of age, is a bad payment. In early times it appears from the case of Holloway *vs.* Collins, in the 26th and 27th Car. 2, 1 Eq. Abr. 300, that the payment to the father of a legacy to the child was held good, but since the case of Dagley *vs.* Tolferry, 1 Wms.,

285, 1 Eq. Abr. 300, the idea of the court has been that it is not a good payment, and that, even in the case of an adult child, it is not good unless done by the consent of the child or made so by a subsequent ratification. . . . It appears from the register's books that evidence was read that the legacy was ordered by the testator to be paid to the father, but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. *It would be a dangerous thing to admit evidence that a legacy given to one person was ordered to be paid to another.* . . . Then let us consider the circumstances of the present case, for I do not mean to interfere with the doctrine of Dagley *vs.* Tolferry, that a payment to the father is bad."

In Miles *vs.* Kaigler, 10 Yerger, 10, Turley, J., delivering the opinion, says (p. 16):

"The rights of infants have at all times been guarded with jealous care by courts of justice, and an interference in any way with their estates, except by persons authorized by law is discountenanced. To such an extent has this principle been carried that even a father, who is a guardian by nature of his infant child, has only the care of his person and is not permitted to have any control whatever over his property, real or personal. Co. Litt., 184; 1 Eq. Ca. Abr., 30; 3 Rep. Ch., 165; 2 Mass., 55; 1 John. Ch., 3; 2 Wend., 153. So that if he receive a debt or legacy he can give no acquittance therefor, *and the debtor or executor will be responsible to the infant upon his arriving at full age as if they had not paid the father.* The reason and justice of this rule is [*sic*] obvious: The infant has not discretion to protect his own rights; his father may be totally unworthy of trust and confidence, and there is no security for his ultimate responsibility."

In Perry *vs.* Carmichael, 95 Ill., 519, decided in June, 1880, Seely Perry, as administrator of Lucinda M. Regan,

brought suit against the M. S. & N. I. R. R. for damages for causing the death of Lucinda M. Regan. The results of that litigation, under the statute, accrued to the father and to the next of kin, who were minors.

While the actions were pending, Marshall H. Regan, the father of the minors, arranged for the settlement of the case with the railroad company for the sum of nineteen hundred dollars. This settlement was carried out by the railroad company paying the money to Regan, the father, upon a receipt and release signed by Perry, administrator, and approved by Regan. Perry, as administrator, *never personally received any of the money* paid by the railroad company, leaving the whole matter to Regan, the father. Perry never stated any account as administrator. Regan, the father, was never appointed guardian, and never accounted to the children. This occurred in September, 1860, and in 1875 the father died. The five children, three adults and two still minors, in January, 1876, filed their bill against Perry, claiming their share of the nineteen hundred dollars (excluding the father's share) and interest, as a trust fund.

The court, in sustaining their claim, says (p. 530):

> "Appellant also contends that inasmuch as he did not, in fact, himself receive any part of this fund, and had no active agency in the bringing of the suit or otherwise in the procurement of the fund, he can not properly be charged with any part of the money received by Marshall H. Regan. We think otherwise. The right of action for its recovery was in him; the suit was begun and conducted in his name and with his knowledge and consent; and the settlement was accomplished with his knowledge and approbation, and he destroyed the right of action by his own release executed under his hand and seal, and the money, by his acquiescence, was placed in the hands of

Marshall H. Regan. It was the complainants' money—a trust fund—and they were minors. *The acts of Regan in this regard must be considered the acts of Perry as between complainants and himself*, and Perry thereby became bound to see to it that this portion of the fund should be placed in their hands, or in the hands of their lawful guardian. Regan evidently assumed to act as their guardian. Not having lawful authority to act as such the receipt of the fund by him did not discharge Perry from his responsibility. *In equity he stood as security to these children that the trust thus assumed by Regan would be faithfully fulfilled.* The money in Regan's hands was a trust fund, and, as to the children of his deceased wife, he became, by the receipt of the money, a trustee. *The mere fact that Regan assumed the trust (not being lawfully authorized to do so) did not relieve Perry from his responsibility.*

"It is insisted Regan was the natural guardian of his infant children and as such had lawful right to the custody of their money. As to the control of the person of the minor the father is guardian by nature. As to the estate of the minor the father has no power without an appointment, and in this way security is provided for the faithful performance of that trust. Perry in permitting this fund to go into the hands of Regan without his being appointed guardian in the proper way, could not relieve himself from ultimate responsibility."

. . . . . .

(Page 531): "This, however, was a trust fund in the hands of Regan—he actually took the money and Perry did not derive any pecuniary benefit therefrom. Justice and equity demand that (while the rights of the children of Lucinda M. Regan should be protected) care be taken to do no injustice between Perry and the legal repre-

> sentatives of Marshall H. Regan, deceased, *so far as the same can be done without impairing the rights of the children.*"

See, also—

> Tripp *vs.* Gifford, 155 Mass., 111.
> P. C. C. & St. L. Ry. *vs.* Haley, 170 Ill., 610.

Indeed, that the father, as such, had no right to receive this trust fund, either under the laws of the District of Columbia, the *situs* of the property, or under the laws of Virginia, the domicile of the testator, is admitted by appellants in their brief, wherein they say (Brf., p. 75):

> "It is, of course, true that, according to the laws of Virginia and of the District of Columbia, there was no specific authority for the receipt of the fund in question by Thomas Turner, the father of the persons entitled, nor, under those laws, was there any authority to Tracy to pay over the funds to Turner *as father.*"

Thomas Turner Had No Power Under Louisiana Laws to Receive Payment.

It is claimed by appellants, however, that the payment by Tracy to Thomas M. Turner was valid and is a discharge of Tracy's estate to the extent of such payment.

This contention rests upon some supposed authority in Thomas Turner, under the laws of Louisiana, to receive the estate of his minor children. Of course, if under the will of Silas Turner, Tracy was authorized to turn over the estate to a guardian of the children and Thomas Turner occupied that relation under the law, and was, by law, authorized to receive the estate, the payment to him would acquit Tracy to the extent of such payment.

On the part of appellees it is insisted that the payments by Tracy to Thomas Turner, entirely apart from its corrupt character, was utterly null and void, because Thomas Turner was not clothed with any legal authority to receive their estate, under the laws of Louisiana or of any other place.

He was not a "natural tutor," as he describes himself in signing the receipt. At that time his wife, the mother of the children, was living and the parents were not divorced. During the marriage there can not be a "natural tutor."

In the case of State *vs.* Parish Judge of Orleans, 6 La. Rep., 363, the court says (p. 365):

> "During the lifetime of both father and mother tutorship is unknown to the law; minor children during that period are subject exclusively to the paternal authority. The father administers the property of his minor children *as usufructuary.*"

Turner Never Complied With Requirements of Louisiana Law Made a Condition Precedent to the Right of Possession.

It is not, therefore, in the character of "*tutor*" that he could acquire any rights to the estate of his minor children, but this right is claimed for him as "*usufructuary.*"

Assuming, for the present, that he could have such a right in this District, still, he never complied with the laws of Louisiana so as to have that right even in Louisiana.

By article 540 of the Code of Louisiana it is declared that, "the usufruct to which a father is entitled on the estate of his children is a *legal usufruct.*"

Articles 223 and 224 declare that—

> "fathers and mothers shall have during marriage the enjoyment of the estate of their children until their majority or emancipation.

"The *obligations* resulting from this enjoyment shall be:

"1. The *same obligations* to which *usufructuaries* are subjected."

What are the "*obligations*" of "usufructuaries" under the law? The code declares them in plain terms, thus (Art. 557):

> "The usufructuary takes things in the state in which they are, *but he can not obtain possession* of the things subject to the usufruct *without having caused to be made in the presence of the owner*, or after the owner has been duly summoned, if he be within the State, *an inventory* with the estimated value of the estates, both movable and immovable, subject to the usufruct *by a notary public duly authorized by the judge* to that effect and *in the presence of two witnesses*."

Counsel for appellants say in their brief that it is pointed out by counsel for appellees that Thomas Turner was, by article 224 of the Code, subjected to the "same obligations to which usufructuaries are subject," and that certain formal obligations of usufructuaries are provided for in articles 557 to 560, and they conclude (Brf., p. 63):

> "But according to article 560 the giving of security is expressly rendered unnecessary in the case of a father and mother having the legal usufruct of the estates of their children."

Articles 557 to 559 prescribe many formalities, among them the making of an inventory *and* the giving of security. From *one* of these many formalities parents are excused, namely, the *giving of security*. There is a vast difference between the two, and excusing a person from *giving security* does not relieve from *making an inventory*, any more than relieving from making an inven-

tory would relieve from giving security. Specifically relieving from *one* formality does not, by inference, relieve from *all*. When the exception is limited to *parents*, can it be extended to *all* usufructuaries? and when the exception in favor of parents is limited to the *single* obligation of *giving security*, can it be held to extend to *all* other obligations? Such a construction of a statute would be repugnant to the entire enactment, because it would then result that a *proviso* as to a *single subject-matter* would repeal the statute *in toto*.

But the obligation to make an inventory is not left to the provisions of article 557 alone, which is article 550 of the older Code.

Article 3350, which is a new section taken from the 12th section of the act of March 8, 1869 (Acts of 1869, p. 117), expressly declares that—

> "*before* fathers and mothers, who by law are entitled to the usufruct of ['have administration of' in original act] property belonging to their minor children *shall be allowed to take possession* of such property and enjoy the fruits and revenues thereof, they shall cause an inventory and appraisement to be made of such property and cause the same to be recorded in the mortgage book of every parish in the State where they or either of them have immovable property."

The question is not, therefore, whether the *giving of security* is a condition, but the *making* of *an inventory*. This, as above shown, is not within the exception of article 560 and is, by article 557, required of *all* usufructuaries, without exception, and by article 3350 is specifically required of parents, not only before they can "*obtain* possession," as in article 557, but before they "shall be *allowed to take* possession."

Appellants in their brief (p. 68) appear to concede

that these provisions of the Code are binding in Louisiana for they say: "It is only when he attempts to collect property *in Louisiana* that he must comply with the requirements of filing an inventory."

In other words, appellants appeal to the laws of Louisiana to establish Thomas Turner's right to act in the District of Columbia, and then claim that those laws give to Turner a greater *extraterritorial* power than they do in the State of their enactment.

The cases cited in appellants' brief from the court of Louisiana have no bearing upon this question; all of them except the last were decided before the Code of 1870, and before the passage of the act of 1869, the twelfth section of which is now article 3350 of the Code of 1870, and none of them decides or considers the question of the obligation to file an inventory. In the case of the succession of Leon Arlaud, 42 Louisiana An., 548, it is clearly shown that the matter of the inventory and its record in the mortgage books of the parish is entirely independent of the obligation to give security, and is a condition precedent to the right to act even in cases where the giving of security is dispensed with by the Code. In that case the mother applied to be appointed natural tutor. The court refused, and she appealed.

In disposing of the case, Bermudez, C. J., says (p. 549):

> "The petition does not allege that an inventory has been made of the minor's property; that a certificate from the clerk showing that amount has been recorded in the mortgage book of the parish of the petitioner's residence, and that the recorder's certificate, establishing the registry, is annexed.
>
> "The provisions of law relied on are controlled by Article 321, R. C. C., which is a new provision. It requires such a showing from tutors who are not bound to give bond (among whom fathers and mothers) *before* [italics are the court's] the judge can make any appointment or authorize letters of

tutorship to be issued (see act 95 of 1869, page 114, sec. 2)."

. . . . . .

"It is only *after* [italics are the court's] the exigencies of the law have been observed that the appointment could be legally made and that letters could legally issue. This compliance was a condition precedent. We are left to the inference that it is because the petitioner did not make a showing of *previous* compliance with legal requirements that the judge declined to grant her prayer."

Louisiana Laws Have No Application to Property Without the State.

To the appellants' proposition that the laws of Louisiana have a greater extraterritorial force than they have within the State, but little need be said. If Louisiana's laws of *permission* can have greater force in this District than in Louisiana, then, indubitably, her laws of *prohibition* upon those attempting to exercise authorities under them must have at least an equal force here with that which they possess in Louisiana.

According to the decisions of the highest court of that State, construing its own statutes, Thomas Turner, had he complied with all the prerequisites of the laws of Louisiana, would have been without power, under its laws, to receive property situated out of the State.

In the case of Moise *vs.* Life Association, 45 La. An., 737, Sydney L. Guyol, a resident of Louisville, Ky., took out a life insurance policy with the defendant, a New York corporation, the policy being payable to the executors and administrators of the assured. Guyol had twice married, and the children of the first marriage had been sent to Louisiana to reside with their maternal relatives. Guyol, their father, died in Kentucky, and the plaintiff, maternal uncle of the minors, was appointed their tutor. An inventory was taken, showing this policy in question and

another policy in another New York company as the only property. The defendant company was engaged in business in Louisiana, and had an agent there authorized to accept service of process from the local courts, as required by local law. The tutor, in his character of tutor, brought suit against the company on the policy. In denying the right of the tutor to maintain the suit, the court said (p. 738):

> "We have no concern with the propriety or validity of plaintiff's appointment as tutor of the minors, nor with his right and power in that capacity to take possession of and administer the estate of their deceased parent, whose heirs they are, *in this State*. Guyol was domiciled and died in Kentucky, and, so far as appears, he left no property, real or personal, in this State. This policy of insurance is a mere non-negotiable evidence of a debt due by a New York debtor to a Kentucky creditor. The appointment by the insurance company of an agent in this State through whom it may be sued, does not change the domicile of the company. Under no possible view can such a debt be said to have a *situs*, real or fictitious, in this State."

The court, then, after holding that there is no ground for administration upon Guyol's estate in Louisiana, concludes (p. 738):

> "Whatever powers plaintiff's commission *as tutor* might confer on him *over property situated in this State, they can not embrace any power* to administer or *collect this debt*, due by a New York corporation to a decedent who was domiciled and died in Kentucky."

The case at bar presents exactly the same conditions. The property involved the right to which, it is claimed, the laws of Louisiana conferred upon the father, consisted

in money due from a resident of the District of Columbia to a resident of the State of Virginia.

The tutor, under the Louisiana Code, like the guardian under our law, represents the minor, and is entitled to the possession of his estate. Yet the Louisiana court held that the power conferred by the laws of that State could not embrace property not located within the State. If the courts of Louisiana deny to their law such extra-territoriality it can not be conferred by our courts.

Laws of Virginia, the Domicile of Testator, Control and Exclude Laws of Louisiana.

While the laws of Louisiana are to be appealed to in order to determine the lawful authority of one acting in an official capacity under those laws, they can have no effect upon the rights of property conferred by a will operating under the laws of Virginia. The status of Thomas Turner and his children, in Louisiana, as to property located there, can have no effect upon their rights, relations, and status as to property in Virginia, the title and possession of which is not in the children. The rights of Turner's children in this property are to be determined by the will, under the law of the testator's domicile, which alone can control all questions as to the validity and interpretation of the will.

In the case of Harrison *vs.* Nixon, 9 Pet., 483, a question arose upon the interpretation and effect of the will; and this court, by Mr. Justice Story, says (pp. 502-3):

> "The present is the case of a will; and so far, at least, as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court are called upon to give a construction to the terms of the will; and in an especial manner, to ascertain who is meant by the words 'heir at law,' in the leading bequest in the will. The language of wills is not of universal interpretation, having the same precise import in all

countries and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs in the distribution thereof and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in his own view.

"No one can doubt, if a testator born and domiciled in England during his whole life, should, by his will, give his personal estate to his heir at law, that the *descriptio personæ* would have reference to and be governed by the import of the terms in the sense of the laws of England. The import of them might be very different if the testator were born and domiciled in France, in Louisiana, in Pennsylvania, or in Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicile, where there are no other circumstances to control their application; and to raise the question what the testator means we must first ascertain what was his domicile, and whether he had reference to the laws of that place or to the laws of any foreign country."

That Thomas M. Turner was expressly excluded from the control and management of the estate, and that such control and management was committed solely to Tracy, in whose possession the assets were, is plain from the terms of the will. That instrument is as follows:

"I hereby give and bequeath to the four children of my brother Thomas M. Turner of Minden Louisiana all property, real and personal, owned by me or in which I have any interest at the time of my death, and appoint Philip A. Tracy *to distribute the proceeds of said property equally between them.*"

By section 2 of the Code of Virginia of 1887, being a literal rescript of section 1, chapter 16, of the Code of 1849 of that State, it is provided:

> "The *common law of England*, so far as it is not repugnant to the principles of the bill of rights and constitution of this State, *shall continue in full force* within the same and *be the rule of decision*, except in those respects wherein it is or shall be altered by the general assembly."

In determining what powers, rights, duties, and obligations Philip A. Tracy had under the will of Silas H. Turner and the rights of Thomas Turner and his children as to the property bequeathed to these appellees, we are not remitted to the law of Louisiana, but to the law of the testator's domicile, which declares that the common law shall be *the rule of decision;* and it is, therefore, by the common law that this will is to be interpreted, and the powers, rights, duties, and obligations with respect to the estate bequeathed are to be ascertained and determined.

The appointment of Tracy was for a specific purpose, and the special duty assigned him under the will was "to distribute the proceeds of said property equally between them."

It is important to observe that Tracy was not directed to pay or deliver the estate to the children nor to any one for them, nor was any time fixed for such payment; while the important words descriptive of Tracy's duty in the premises are "*to distribute*," which involves the idea of division and delivery to the specific beneficiaries. Furthermore, what he was to distribute was "the proceeds of said property." The term "proceeds" here clearly comprehends money, so that he was to collect money due, and convert into money property which was not money, and then "*to distribute*" "*equally between them.*"

The fact that at the time of executing this will, April 30, 1888, the testator knew that his brother, the father of

complainants, was then in life, strongly emphasizes the plain intent of the testator, expressed in unambiguous language, that Tracy and not the father, either as such or in any official capacity, was to exercise all authority over the property, entirely apart from the fact established by the testimony of Erle H. Turner (Rec., p. 71), that at the time of dictating the will the testator informed Tracy, the scrivener of the will, that the testator would not commit the property to Thomas M. Turner because of the testator's apprehension that said Thomas M. Turner would squander it.

Looking to the common law interpretation of this instrument, it will be found that much less positive language than is employed in this will is held to constitute Tracy the sole and exclusive trustee of the fund, with the obligation *himself to distribute* it directly to the parties beneficiaries thereunder.

In the case of Cooper *vs.* Thornton, 3 Brown's Chancery Cases, 96, decided in June, 1790, the testator, by his will, gave several pecuniary legacies, among them one "to Thomas Cooper of street, Westminster, one hundred pounds to be equally divided between himself and his family." The executor paid this legacy to Thomas Cooper, who, at the time, had a wife and seven children, one of whom was an infant. The father died, and after his death the children filed a bill against the executor for the legacy. The court sustained the payment to the father as valid, on the ground that he was designated by the will to receive the same, saying (p. 98):

> "Here after several other legacies all with the words, 'I give to,'&c., is the following: 'To Thomas Cowper, to be divided between himself and his family.' It is contended, that, notwithstanding the case of Dagley *vs.* Tolferry, here Thomas Cowper's was to be the hand to receive. I should do the harshest thing imaginable to make the executor pay it over again. It is true the testator has not

> inserted the words *by him to be divided*. If he had, there could not have been a doubt; but if he meant the executors to divide why did he mention Thomas Cowper? What did he mean by the word himself? That can only be applicable if Thomas Cowper is to divide. Then it is not to him and his children, but to his family, which is much more extensive. It is to be paid to him, and *he, as a trustee, is to divide it* . . . (p. 99). But, under the circumstances of the case, I believe it is well paid and that it was intended that he should receive it. If one was to give a legacy to the Senior Six Clerk, to be divided among himself and the other Six Clerks, I think it should be paid to the Senior, and the executor not be put to inquire who the other Six Clerks were."

It is to be observed that in this case of Thornton's will, as pointed out by the learned judge, the will did not say "by him to be divided," but merely said to be divided between himself and his family, without specifying who was to make the division. The court held this expression to be the equivalent of saying "by him, Thomas Cowper, to be divided," and that therefore the legacy was well paid to him, Thomas Cowper. And the court says that if the will had said "by him to be divided," there could not have been a doubt."

In the case at bar, however, the language is as specific as possible. Tracy is not only specifically designated as the person to make the division in equality among the beneficiaries, but he is directed by the much more specific words "to distribute." Had there been an executor named in the will of Silas H. Turner, or had an administrator *cum testamento annexo* been appointed, such executor or administrator would not have had the duty of ascertaining who were the four children of Thomas M. Turner and of making equal distribution among them,

but would have discharged his full duty by turning over the fund, undivided and undistributed, to Philip A. Tracy, whom the testator appointed "to distribute the proceeds of said property equally between them," and a payment to a guardian of the children instead of to Tracy would have been a violation of the will.

Thus it is seen that the sole and exclusive right to the distribution of this fund among the beneficiaries was, by the plain and unambiguous language of the will, committed to Philip A. Tracy; that in the language of the court in Cooper *vs.* Thornton, his "was to be the hand to receive," and "it is to be paid to him, and he, as a trustee, is to divide it."

Had it been the intention of the testator to give the property directly to the children through whomsoever might be their guardian appointed, he could have stopped with the mere bequest of the property to the four children, but he did not do so. After bequeathing the property to them in apt and sufficient language, he adds, what would have been worse than superfluous had he intended the estate to pass directly to them through a guardian, the important words, "and appoint Philip A. Tracy to distribute the proceeds of said property equally between them."

It is plain that in making this will Silas Turner had no idea of subjecting the property which he had accumulated and given to his brother's children to the laws of a foreign jurisdiction by which the entire object he had in view might be defeated, and no other object can be supposed for his creating Tracy a trustee to distribute it among them than to insure their receiving it as a separate estate, unfettered by any rights of parents or guardian under alien laws. Having created this separate estate for the benefit of the children, it is brought within the provision of the Louisiana Code, which excludes the

parent from any right in the estate. Article 226 provides:

> "This usufruct shall not extend to any estate which the children may acquire by their own labor and industry nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct."

Of course, it was not necessary that Silas Turner should, in express terms, negative the laws of Louisiana in order to cut off this usufruct.

He knew that he was a Virginian and that the laws of Louisiana could not enter into the interpretation of his will. By the interposition of a trustee to take the estate and distribute it among the children, he had, under the common law rule of decision of his domicile, cut off all other interests than their own. Had he left the property to them without more, a duly appointed and qualified guardian could have received it, but by the interposition of a trustee for their benefit he effectually extinguished all other rights in the property.

It is conceded by appellants that had Tracy refused to turn over any of the fund to Thomas Turner, Turner could not have maintained a suit therefor in this District without complying with all the formal prerequisites of the laws of Louisiana and of this District, but it is claimed that he being the proper person to receive the estate, a voluntary payment to him is valid and discharges Tracy.

In order to make a voluntary payment of money a valid discharge of the person making the payment, it must be made either to the owner of the money or to one legally authorized to represent him. A payment to one who is not the payee of the fund nor legally authorized to receive the fund for the payee is a payment to a

stranger and manifestly can not affect the rights of the parties entitled.

To make the voluntary payment by Tracy to Turner valid it must be shown that Turner had the legal right to receive the money, either in the capacity of the legal representative of the true owners, or that he was himself entitled to receive it in his own right.

That Turner was not guardian in the sense of our laws, or tutor under the laws of Louisiana, has already been shown. Holding, therefore, no position of official representation under the laws of Louisiana, or of any other State, the rule applied to cases of voluntary payments to foreign executors or administrators can not be invoked in support of the payment to Turner.

An executor, administrator, guardian, or natural tutor all hold official positions under the laws of the place of their appointment, which specifically authorize them to receive property belonging to those whom they officially represent.

Thomas Turner occupied no such official position to appellees, and is, therefore, entirely without the rule which applies to such class of cases.

To hold that Thomas Turner was the owner of the fund in his own right is to negative the plain terms of the will, which specifically bequeaths it to other persons, and a payment, therefore can not be valid on the principle that he was himself the payee of the fund.

But it is argued by appellants that under the law of Louisiana Thomas Turner was *usufructuary;* that is, that he had a beneficial interest or usufruct in the fund as his own, and, as such, the right to its possession.

There are two answers to this proposition:

First. The right of possession by voluntary reception of the subject of the usufruct is, as before shown, under the laws of Louisiana subject to the condition precedent of making the inventory. The law does not permit the

usufructuary to obtain possession of the subject of the usufruct in secret, without first giving the remainderman, under proper guaranties, the opportunity to know the estate which is taken by the usufructuary, and the mere fact that parents are relieved from giving the special security required of other usufructuaries intensifies the obligation to make the inventory.

The making of the inventory is made a condition precedent, section 557 of the Code providing that they "can not obtain possession" without having caused the inventory to be made, while article 3350 is still more prohibitive and declares that they shall not "be allowed to take possession" before making the inventory.

The question here is not the attaching of the usufructuary right which appellants claim vests by operation of law *ex proprio vigore*, but is the acquisition of possession.

There is an obvious difference between the right of usufruct and its actual enjoyment. The usufructuary who obstinately refuses to make the inventory and give the security required of usufructuaries will be denied the possession and enjoyment of the subject of the usufruct, and so a usufructuary who is only required to make an inventory, but refuses to do so, will be denied the possession and enjoyment of the usufruct. The right to the usufruct is one thing, but the right to its possession and enjoyment is an entirely different one. The law confers the one; compliance with its conditions by the act of the party confers the other.

But in this case not only the right of possession, but the legal right of usufructuary, never existed in Thomas Turner. The laws of Louisiana can not, *ex proprio vigore*, operate upon property never within the territorial limits of the State. Silas Turner did not lose the law of his domicile, the control of his property, and the power to vest it by will exclusively, in the selected objects of his bounty, while

the *situs* of his property was in the District of Columbia, because the legislature of Louisiana had enacted statutes. His power over the property and the title and rights of his legatees are to be determined by the law of his domicile, and not by the laws of Louisiana. As neither Silas Turner, nor his trustee, Tracy, nor the property subject to the trust were ever subject to the jurisdiction and laws of Louisiana, no privileges which those laws may have given to parents with respect to property, the *situs* of which was in the State of Louisiana and therefore subject to the operation of its laws, could take effect.

Not only was the property without the territorial jurisdiction of Louisiana, but it was not in the actual or constructive possession of either Thomas Turner or his children, and the children of Thomas Turner never even acquired the legal title to it, so that in no possible view of the subject could the laws of Louisiana attach to it. It remained in the hands of Tracy, as trustee for the estate of Silas Turner, primarily, and thereafter, with the duty to render it to the domiciliary executor or administrator, to hold for the beneficiaries of the will, subject only to the laws of Silas Turner's domicile.

It is worthy of note that Mr. Tracy, in his instructions to his executors, does not claim to have delivered the property to Thomas Turner as usufructuary, as guardian, or as natural tutor. He makes no claim to having delivered it to him in any other capacity than as father, and had Turner represented to him, as counsel for appellants ask the court to believe, that he had authority under the laws of Louisiana to receive the fund, Tracy would undoubtedly have mentioned that supposed exculpatory circumstance in his confidential communication addressed to the "private ears" of his executors.

The law of Silas Turner's domicile is not to be overlooked in this case. He was the owner of the property

and the testator who bequeathed it, and to the law of that domicile resort must be had to ascertain the rights of all parties in his estate. In due course his estate should have been remitted to that domicile for administration and then committed to Tracy for the execution of the trust reposed in him.

By the law of Silas Turner's domicile no foreign guardian could have acquired possession of this estate without complying with the provisions of the Code of Virginia, which requires, as a condition precedent to the right to obtain possession, and as a condition to the discharge of the person surrendering possession, that there shall have been a formal application on behalf of the foreign claimant to the courts of Virginia for leave to receive and remove the estate, notice of which shall be published for four weeks in a newspaper, and the surrender shall only then be made upon authentic documentary evidence that the foreign guardian or other person claiming the estate has given bond with sufficient surety to assure his accountability for the whole amount of the estate, and upon proof satisfactory to the court that the delivery of the assets will not be prejudicial to the interest of any person.

> Code of Va., 1887, sections 2629 to 2635.
> Code of 1873, title 37, chap. 125, sections 3 to 9.

These provisions are mandatory and can not be waived.

In the case of Snavely *vs.* Harkrader, 29 Grat., p. 112, where, in a judicial proceeding to which the minors were parties, the court had decreed the amount due to them to be paid over to their foreign guardian, the Court of Appeals reversed the decree, stating (p. 130):

> "The court is further of opinion that so much of said decree as directs the appellant to pay over the amounts found due by Commissioner English's report to the foreign guardian is erroneous. Such

payment can only be made in accordance with the fifth section, chapter 125, Code 1873. That section provides as follows:

"'No such order (i. e., order referred to in the third and fourth preceding sections, referring to transfer of property of infant or insane person) shall be made until notice of application shall have been published once a week for four successive weeks in a newspaper, nor until it shall be shown by authentic documentary evidence that such foreign guardian, or committee, has, where he qualified, given bond with surety sufficient to insure his accountability for the whole amount of the wards or insane person's estate in his hands, or which will probably be received by him as such guardian or committee, nor until the court shall be satisfied that the removal of such money or property from the State will not impair the rights or be prejudicial to the interests, either of the ward or insane person or of any other person.'

"These provisions of the statute are mandatory, and must be complied with before any money or other personal property belonging to a non-resident infant can be paid over to a foreign guardian.

"The proper proceeding in this case would be the filing of a petition by the foreign guardian and the publication of notice of such petition or application 'once a week for four successive weeks in a newspaper,' as required by the statute. These provisions of the statute not having been complied with, so much of said decree of the circuit court as directs payment of money due the wards to the foreign guardian without his compliance with the aforesaid provisions of the statute is erroneous and must be reversed."

The right of *usufructuary* claimed for Thomas Turner, under the laws of Louisiana, in this case, is not an official character in which he is representative of the Louisiana legatees and claims the legacy in their behalf, but is a *beneficial interest in himself*, in right of his parent-

age, a part of the Louisiana law of domestic relations, applying to persons and property within the State, and can clearly have no application to property never in the State.

This question, it is submitted, has already been decided by this court adversely to the contention of appellants.

In the case of Texas and Pacific Ry. Co. *vs.* Humble, 181 U. S., 57, it was claimed that the plaintiff, a married woman, whose husband was domiciled in Louisiana, could not maintain an action for personal injuries in Arkansas under the laws of Arkansas, because, under the law of Louisiana, the domicile of her husband, the damages were community property; but this court affirmed the judgment of the Circuit Court in refusing to allow the laws of Louisiana to control the property rights of the plaintiff in Arkansas.

Mr. Justice Hagner, in passing upon this question at the special term, said: (Rec. 28-9):

> "On behalf of the defendants it is insisted that under the law of Louisiana, where Thomas M. Turner was residing with his minor children at the time of his brother's death, the right to receive and receipt for the money belonged to him 'as natural tutor and agent of his minor children;' and this contention has been the subject of a large part of the arguments presented by the opposing counsel.
>
> "After a careful consideration of this contention, I have arrived at the conclusion that Thomas Turner had no such right or power under the law of the State of Louisiana as is contended for by the defendants. Conceding the law of Louisiana could control the lawful distribution of the estate of Silas Turner (who was domiciled in Virginia when he died, never had any property relations with and never held any property within the State of Louisiana; but all he owned was situated either at the place of his domicile or in the District of Columbia), yet none of the essential, pre-

cedent steps pointed out by the statutes of Louisiana as to what are denominated *usufructuary interests of parents* in the property of their minor children, were taken, either by the prescribed summons or by the requisite inventory or appraisement. Nor is there anything to show that any of the subsequent forms and manner of procedure required by the statute of Louisiana, which contemplates a contestation of the claims of the father presented in behalf of the children, were attempted to be pursued by Thomas Turner in that State.

"If, according to these laws, such provisions were considered important to the protection of minor children where the property should be located within the State of Louisiana, *a multo fortiori* should their observance be held essential with respect to property in a foreign jurisdiction which had never come within the cognizance of the courts of the State. If these safeguards could thus be disregarded, the property of minors could be seized by the father under the pretext of tutorship, and their ruin be accomplished without the pretext of any form of securityship or other indemnification against spoliation. To apply such principles under these circumstances of neglect would be truly *agnem committere lupo.*

"4. But, in my opinion, the laws of Louisiana on the subject of tutorship can have no extraterritorial effect, and therefore can have nothing to do with the matter in hand. 45 La. Ann., 737. Morse, tutor, &c. As Silas Turner held no property situated in Louisiana, he was under no obligation to the laws of that State, which had no more authority to administer his Virginia estate than the courts of State of Mississippi or Texas."

The Court of Appeals, in passing upon the effect of the payment to the father, says (Rec., p. 423):

"There is no support for the contention that Tracy was relieved of any part of his responsibility to the complainants by the payment to Thomas

> M. Turner, and the receipt therefor executed by the latter as natural tutor and agent of his minor children. It is not pretended that there was any authority for the receipt of the fund either under the laws of Virginia, where Silas H. Turner lived and died, and where his will was probated, or under the laws of the District of Columbia, where Tracy resided and where the fund was deposited. Even if resort could be had to the law of Louisiana, where the complainants then lived, we find nothing in the articles of the code of that State, which have been brought to our attention, that empowered their father to receive the fund as their tutor, guardian, or agent."

It is respectfully submitted that the payment to Thomas Turner was wholly unauthorized, null, and void, and that the decree of the court below in so adjudging it was right.

The Payment to Turner Corrupt and Fraudulent and a Scheme of Tracy's to Appropriate Part of the Trust Estate.

That Tracy could have relieved himself absolutely from all responsibility for this large trust fund by allowing the case to proceed regularly through judicial settlement can not be denied. That he omitted this ordinary precaution and undertook to effect the settlement in the manner he did calls for explanation.

Though Tracy was dead at the time the bill was filed, he appears to have appreciated the possibility of a suit against him in respect of this matter, and undertook to provide his executors with a defense to such suit in the shape of an *ante mortem* deposition, left with his will and filed with appellants' answer in response to the discovery sought in the bill (Rec., pp. 15, 293).

This statement to his executors was prepared by Tracy with great care, at the suggestion of the witness Tyler,

and after its preparation was carefully copied by Tyler for Tracy (Rec., p. 296); and it was prepared after he had become "alarmed" and had "consulted a lawyer" (Rec., p. 201).

Of course, this paper can not be treated as evidence for Tracy, it being his unsworn *ex parte* statement in his own behalf, but it is evidence in so far as it contains admissions against his interest. Its presence in this record constitutes a notable exception in suits against deceased persons, in that the decedent has left behind his account of the transaction and of whatever he saw fit to say in his defense.

By this paper Tracy admits that in 1871 he received from the hand of Silas Turner the sum of $12,000, not as a depositary to keep in a safe place and return when demanded, but to invest in real estate notes. This he claims to have done within the course of a few weeks; that the interest on the notes was payable semi-annually, and that when due the notes would be sent to him by Silas Turner to have the interest credited on them; that Silas rarely asked for any of the proceeds of these investments, but, on the contrary, the interest as it accumulated was reinvested by Tracy, together with the principal of any maturing notes. It also appears from this statement that at a subsequent period Silas Turner delivered the notes themselves into Tracy's keeping and that Tracy continued the process of investment and reinvestment under this new condition.

The only evidence of title to or ownership of the property in Silas Turner was contained in a list of the notes which Silas retained. The notes themselves were negotiable, and it does not appear from anything in the record that any one of them was made payable either on its face or by endorsement to Silas Turner, but if so they must have been endorsed in blank by Silas Turner, as otherwise Tracy would not have been enabled to dispose

of them, and they could not have been disposed of after Silas' death except through endorsement by an executor or administrator.

In this situation of affairs, while Tracy held in his possession and absolute control the entire property and estate of Silas Turner, with the power and duty of investment and reinvestment, and with all the indicia of legal title and ownership which must necessarily accompany the possession, dominion, and control of promissory notes, Tracy, with his own hand, on the 30th of April, 1888, wrote a will for Silas Turner, witnessed its execution, and subsequently by his deposition under the jurisdiction of the competent court in Virginia, the domicile of Silas Turner, accomplished its probate.

The words of the will which Tracy then wrote for Silas Turner are:

> "I hereby give and bequeath to the four children of my brother Thomas M. Turner, of Minden, Louisiana, all property real and personal owned by me or in which I have any interest at the time of my death and appoint Philip A. Tracy to distribute the proceeds of the said property equally between them" (Rec., p. 2).

Having with his own hand written that paper and seen it executed, while the property which it undertook to dispose of was in his possession and control, it is interesting to observe his own understanding of the effect of that paper with respect to the appellees and to himself, as given in his statement to his executors. He thus states it:

> "He died in Virginia leaving his entire estate to the three minor children of his brother then living in Louisiana. In his will he named me *to settle up the estate and divide the money among the children*, but as the laws of Virginia require two witnesses to a will and says neither of them shall be an executor I could not qualify" (Rec., p. 15).

From this it appears that Tracy perfectly understood that the beneficiaries of the will were Thomas Turner's children, that they were minors, and that he, Tracy, was the executor under the will.

It is not important to determine whether the language of the will was sufficient to create Tracy an executor, but it is important to note that he considered such to be its effect.

Although himself a native of Virginia, he appears not to have understood the laws of his State with entire accuracy, as he was entirely in error in stating that the law would not permit a witness to be an executor.

The law of Virginia, like the English statute, permits legatees and devisees to be competent witnesses, but declares, under certain conditions, a devise or bequest to such void. It expressly rendered competent as witnesses creditors whose debts were charged upon the estate by will, while section 21 of chapter 122 of the Code of 1849 provided:

> "No person shall, *on account of his being an executor of a will*, be incompetent as a witness for or against the will."

And this section of the law of 1849 was literally transcribed and re-enacted in the Code of 1887, being there section 2531, which Code went into effect on the first day of May, 1888.

Tracy Violates His Trust.

In this posture of affairs, having in his possession the entire estate of Silas Turner; having stated no account and received no acquittance with respect to his stewardship of sixteen years; knowing the direction given to the property by the testator under a will which he himself had written; knowing that he had been designated to distribute the proceeds of the estate among the benefi-

ciaries who were minors, and believing himself to be named as executor, but disqualified from acting, as he claims to have supposed, by the law of Virginia, what course did he pursue?

Did he appeal to the courts of Virginia, the domicile of his testator, and the State whose laws controlled and whose courts he knew had jurisdiction of the matter and had actually entered upon its exercise by assuming the probate of the will he had drawn? Did he appeal to the courts of this District, where he lived and where the property was?

According to his statement he did none of these things, but says:

> "I could not qualify [as executor] and as the father if appointed *could not have given the bond* I handed him the package of notes, advised him to deposit them in the Second National Bank of Washington, D. C., which he did and agreed to look after them and have them all paid, he being out of the city" (Rec., p. 15).

Thus he confesses to the court that he not only repudiated the office of executor, which he supposed was conferred upon him by the will; he not only repudiated the duty of distributing the estate, which he also states he knew was conferred upon him; he not only declined to give to any of the judicial tribunals competent to deal with the matter jurisdiction to do so; but, according to his account, turned the entire estate over to a man who he declares could not give the bond which the law required.

For this extraordinary conduct Tracy, in his statement, claims some credit, for in its conclusion, he says:

> "My turning the property over to the father helped to keep it in the possession of those to whom it was left and to discourage and shut out the dissatisfied relatives, for if any one had quali-

fied the matter would have been open for a year and they would undoubtedly have made an attempt to have the will set aside."

By this attempted justification of his conduct he discloses that he knew the effect of his action was to conceal, from those entitled to know, the facts about Silas Turner's estate, and that this action was taken with that purpose in view.

It is only fair to Tracy's intelligence to point that it was not his purpose that this extraordinary explanation of his conduct should be communicated to the parties in interest or to the courts which might have cognizance of the matter, for his final injunction to his executors in the closing sentence of this statement is:

"This is a plain statement of the case *intended for the private ears* of my executors."

That the course which Tracy pursued in this matter was irregular and unlawful will not be denied; that Tracy appreciated its unlawful and irregular character and that he might be subject to suit by reason thereof is plain, for the paper from which the foregoing extracts are taken in terms expresses his apprehension that, although no claims of any sort had been made upon him, his estate might be sued for the money.

From the beginning to the end of the paper Tracy makes no explanation of his extraordinary conduct. He nowhere discloses why he ignored all legal duties and requirements and turned over this large estate to a man who, he, himself, declares, was financially irresponsible, could not furnish the security which the law would require for his honest conduct, and whom he had not seen or communicated with since before the civil war (Rec., pp. 98-9, 106), and of whom one of appellants' witnesses says (Rec., p. 319):

"He was actually so poor that he was ashamed

> to make his appearance before his Virginia relatives, and he certainly did look just as hard as he intimated. He looked that way, sure."

Yet, Tracy tells us that, without hesitation, he turned over this large estate to this impecunious individual whom he had not seen in thirty years. He does not suggest that he was urged or persuaded, or that any inducements were held out or any pressure brought to bear, but describes the whole transaction as his own voluntary act, for reasons nowhere disclosed.

When it is seen that Tracy voluntarily took the risk of turning over this large fund in secret to an utterly irresponsible man instead of protecting himself by the simple and ordinary methods through the courts, which risk his statement shows he knew to exist and appreciated, some explanation of his extraordinary conduct is naturally expected. None, however, is offered by him.

This record furnishes that explanation.

It is a demonstration, from the record, that the explanation of this conduct is Tracy's greed and fraud, for the evidence conclusively establishes that through the transaction to which he refers he secured for his own use and benefit about six thousand dollars of the estate.

For proof of this statement it is not necessary to depend upon the testimony of witnesses, as it is established by documentary evidence prepared by Tracy.

Referring again to the communication to his executors in which Tracy details the delivery of the notes, the sole evidence of Silas Turner's entire estate, to himself, will be found this statement:

> "After a time he brought me the notes, *keeping a list of them*, and asked me to keep them to save him the trouble of sending them to me by mail whenever the interest was due" (Rec., p. 15).

Thus Silas Turner is shown as parting with the posses

sion of his entire estate to Tracy and retaining, as evidence, only a list of the notes. That list is produced in evidence and was the only scrap of writing of any sort or description in Silas Turner's possession at the time of his death to indicate that he had any estate, and even that did not disclose in whose possession the notes were or Tracy's connection with them in any way, except the important fact that it is entirely in the handwriting of Tracy.

Upon an examination of that list (Rec., p. 211) it will be seen to be an itemized schedule of the notes, giving their dates, the names of the makers, the number of notes, and the aggregate amount of their principal, and that it contains no charge or liability of any kind except the principal of the notes. The last entry made upon it is under date of March 12, 1888, less than two months before the writing of the will, and it embraces forty-eight notes, the principal of which foot up the important sum of $28,972.10.

A comparison of this list of the notes surrendered by Silas Turner to Tracy in 1888, with the receipt taken by Tracy from Thomas M. Turner in November, 1888, also in Tracy's handwriting, will show that the following notes contained in the list given to Silas Turner are omitted from the receipt taken from Thomas, namely: Susan W. McNamee, $1,700; J. H. Hollidge, $800; Jennie J. West, $3,400; Caroline Isdell (2), $1,335.20; Mary J. Lewis (3), $1,200; John L. Carusi, $1,350; Rufus A. Morrison, $1,500; G. H. LaFetra, $1,036.90; John B. Avery, $200; in all twelve notes, aggregating $12,522.10. In lieu of these there were turned over by Tracy to Thomas M. Turner the following notes not appearing on the list given to Silas Turner in his lifetime, namely: Roth and Moore, $325; Thomas H. Benton, $240; Frank W. Page, $3,000; J. L. Burns (3), $1,387.50; E. V. Jarvis, $200; C. A.

McEwen (2), $1,200; in all nine notes, aggregating $6,352.50—a difference of $6,169.60.

It will be observed that this receipt taken from Thomas Turner foots up $25,379.39, or a difference of only $3,592.71 instead of $6,169.60. This result is brought about by Tracy's artfully including in the receipt $1,800 of money alleged to be invested in lots on Maryland avenue northeast, admittedly not delivered to Thomas Turner; $439.25 cash, which was interest collected on Turner's notes, and $600 *accrued interest, then due and not collected,* on the notes delivered, and cash in the sum of $337.64, the source of which is not explained in the testimony.

It is admitted that Tracy never delivered the $1,800 invested in land. He is not entitled to credit, as against the principal of the notes in his possession, for the sum of $439.25 interest collected and paid, and the sum of $600 of accrued but uncollected interest, as interest cannot be credited in extinguishment of the capital from which it results. So that, giving him credit as principal for the $337.64, the source of which is not explained, and for all the notes which he delivered, according to the receipt, the difference on the face of his own receipt between the amount turned over to Thomas Turner and the amount with which he had charged himself in the list given to Silas Turner is $5,831.96.

That Tracy retained for his own use part of the trust fund is further demonstrated by his own letter of May 7, 1892, in which he says he is considering the giving to Miss Henrietta Turner—

> "A part or perhaps all of the commission I charged on your brother's estate (5 per cent). . . . This amount of my charge for attending to the business for 16 years ($120 a year) will stand" (Rec., p. 230).

This subject was carefully analyzed by the auditor

after hearing the testimony and arguments of counsel, and he reaches the same result (Rec., p. 370).

Counsel for appellants recognize the overwhelming force of this situation, for they see it is impossible to excuse Tracy's conduct on legal or moral grounds if he derived a corrupt advantage from the transaction. In order to escape, therefore, the force of this evidence they boldly contend that the list of the notes given by Tracy to Silas Turner is not to be taken as the basis of the charge against Tracy, but, on the contrary, the list contained in the receipt prepared by Tracy and signed by Thomas Turner. In other words, Silas Turner is not entitled to charge Tracy with the list written by Tracy's own hand at the time of the delivery of the notes, and which Tracy had in his hand and actually made entries upon in January, February, and March, 1888, and the only evidence which Silas Turner had of any claim against Tracy, but, on the contrary, Silas Turner's claim is to be limited to a list concocted by Tracy more than six months later and two months after Silas' death, while the list given to Silas as a receipt for his notes surrendered to Tracy is to be eliminated from the case and denied all consideration.

In the foregoing discussion no reference has been made to the direct and positive testimony of Thomas M. Turner on this subject. He testifies positively that Tracy retained over six thousand dollars, that he knowingly and admittedly did so and induced Turner to submit to the exaction on representations that he, Tracy, would not qualify as executor, that Turner could not qualify as executor or guardian, that there was danger of the will being contested, that there was a heavy inheritance tax, and that in the end he would probably get less unless he settled on Tracy's terms. (Rec., 110-112).

The testimony of Thomas Turner is in part confirmed

by the written statement of Tracy to his executors, in which he says:

> "His other relations, a sister, some nephews and nieces were much displeased with the will and threatened to attempt to have it set aside but have not done so" (Rec., p. 15).

And again:

> "My turning the property over to the father helped to keep it in possession of those to whom it was left and to discourage and shut out the dissatisfied relatives, for if any one had qualified the matter would have been open for a year and they would undoubtedly have made an attempt to have the will set aside" (Rec., pp. 15-16).

The position of appellants' counsel utterly ignores the true nature of the two papers. The list given by Tracy to Silas Turner in March, 1888, is in legal effect an itemized receipt, by which he acknowledges to have received from Silas and to have in his possession the notes therein described. If by accident or mistake the list included notes not delivered to Tracy, that fact could have been shown, but it will not be contended that a syllable of evidence was offered showing such error, or even for the purpose of showing it, and it is incredible that Tracy could have made an error of more than six thousand dollars, involving so many specific items, without discovering it, and had proof been offered tending to show such an error it must necessarily have been of the most conclusive character to be accepted.

The position of appellants' counsel is that Tracy is not to be charged by the receipt which was made by him for the purpose of charging himself, and given to the man who had the claim against him; but, on the contrary, his liability is to be measured by a paper made after Silas' death for the purpose of exculpating, and not of charging, Tracy.

The contention now made that the receipt signed by Thomas Turner should be the basis of charge against Tracy, and not the receipt given by Tracy to Silas Turner when Silas Turner committed his whole estate into Tracy's hands, was also made before the auditor, but the auditor ruled against that contention, saying:

> "Upon the point of this discrepancy a question of location of the burden of proof is made in argument. I think the rule in this respect is thoroughly established. It being conclusively shown that within six months before Turner's death Tracy had nearly $29,000.00, principal of securities in his possession as agent or trustee of Turner, the inevitable presumption of law is that of continued possession and accountability.
>
> "This rule applies with special force in the present case in view of the business methods prevailing between the parties as described by Tracy. He was to retain possession and control of the investments, however their character might change from time to time by collection and reinvestment (instructions to executors, page 15 printed record).
>
> "The burden of proof to rebut this presumption being with the defendants they have not been able to meet. The basis of the account therefore must be the statement marked Exhibit Erle H. Turner No. 22." (Rec., 370).

That the claim now made by Thomas Turner that Tracy had corruptly kept six thousand dollars of the fund is not made for the first time in this suit is proved by the testimony of the *appellants*' witnesses.

The witness, Robert Rust, called by the appellants, testified on *direct* examination, that after Thomas Turner had obtained the money and returned to Virginia, they were walking together and Thomas Turner—

> "told me that he had received, according to my recollection of it, twenty-four thousand dollars,

and that the estate amounted to thirty thousand and that he had given six thousand dollars of it—there was six thousand dollars of it that went somewhere in the way of commission. Did he say to whom? I asked him the question at the time if he didn't think it was pretty steep commission. What did he say? Well, my recollection of it is that he said then that he thought the commission was pretty steep, but he had consented to close the matter." (Rec., pp. 306, 307).

The witness, Justin E. Sowers, also called by the *appellants*, testified on his *direct* examination, as follows:

Q. What information did you obtain from Mr. Thomas Turner as to his having obtained from Tracy the money or any of the money of Silas Turner? A. Some little while after he made this remark that he would have to get proper authority to get this money, he came down to Washington, and a little while after his return to Washington he told me that he had gotten from Philip Tracy twenty-four thousand dollars and that Silas' estate amounted to about thirty thousand dollars—that is my recollection—but that *Mr. Tracy kept that for his commission.*

Q. He kept the difference between what he received—A. Between what he received and what the estate amounted to.

Q. Did you say anything further to him about it? A. I told him I thought that was a right stiff commission. His reply to that was that he thought it would be better to settle on Tracy's terms. If he did not it would protract the settlement of the estate and it might in the end cost more and he thought it would be for the best interests of his children to accept Tracy's terms (Rec., pp. 318, 319).

It is incredible that Thomas Turner in 1888, just after receiving the notes from Tracy, eleven years before this bill was filed and thirteen years before he testified in

this cause, would have told appellants' witnesses, Rust and Sowers, this same story to which he has testified in this case were it not true.

Not only did the trial court find, as a fact, from the evidence, that Tracy had fraudulently appropriated this six thousand dollars, but the Court of Appeals, in its opinion, twice concurs in that finding, saying (Rec., p. 423):

> "And without regard to his right to turn over a part of the fund to Thomas M. Turner, the *proof shows that he retained from him about $6,000 of the original fund to which the complainants were entitled.*"

And again on (Rec., p. 424):

> "We find no error in the allowance by the auditor, and its confirmation by the decree, of interest upon the fund in Tracy's hands from November 30, 1888, when he violated his trust by paying the bulk of the fund to Thomas M. Turner, *and retaining the remainder, about $6,000, and using it for his own benefit.*"

Under these conditions the words of Mr. Justice Peckham, delivering the opinion of this court in Brainard *vs.* Buck, 184 U. S., 99, are apposite (p. 104-5):

> "Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the Court of Appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. *It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous.*"

Appellants are brought to such stress by this feature of the case that several pages of the brief (Brief, pp. 104-112) are devoted to an effort to impeach the evidential value of the list of notes found in Silas Turner's possession. But these supposed objections to this paper as evidence were not raised in the trial court. On the contrary, when the paper was formally proved and offered in evidence it was admitted without objection (Rec., p. 52) ; when, again, it was proved a second time by another witness no objection was offered (Rec., pp. 106-7), and, finally, by a formal stipulation of counsel it was agreed (Rec., p. 288) :

> "That the exhibit marked 'Ex. Erle H. Turner No. 22' is in the genuine handwriting of said Philip A. Tracy, with the exception of the lead-pencil footings in figures and the abbreviation 'am't for'd' on the second sheet thereof and the memorandum in lead-pencil at the foot of second sheet consisting of the words 'This list was given by Mr. Tracy as a list of property of S. H. Turner in his hands.'"

It is submitted that under these circumstances it is not open to the appellant now to impeach the genuineness of said paper or to question its competency or sufficiency as evidence in any way.

It is demonstrated by this record that Tracy, to whom this trust fund was committed for the benefit of these minors, three of whom at the time of Silas' death were of the tender ages of six, nine, and thirteen years, ruthlessly disregarded his trust and their interests. The large estate left to them, which would have yielded a handsome income for their benefit during their minority and a substantial capital to start in life when of full age, was unscrupulously turned over to the very person whom the testator had carefully designed should not have it, and, as shown by the record, was wasted and gone within three

years, and all this was done in the dark, in a room in a hotel, carefully avoiding the jurisdiction and scrutiny of the courts, which should properly have had cognizance and control of the matter, and for no other possible reason than that this faithless trustee, who disregarded the confidence reposed in him and was insensible to the ordinary humane considerations that should appeal in the case of helpless little children, might convert to his own use $6,000 of the fortune entrusted to him by their confiding uncle.

Even if it were conceded, as claimed by appellants, that the receipt taken by Tracy from Thomas M. Turner and not the one given by Tracy to Silas, is the true foundation of claim in this case, it would only affect the *amount* of his wrongdoing, for this corrupt and dishonest conduct of Tracy is still established. It is conceded that he never turned over to any one the $1,800 invested in Maryland avenue lots, and it is proven by the appellants' witness that the fund by this investment amounted, on February 6, 1890, to $3,069.25; yet he retained this sum in his possession, which, with interest to February, 1898, would amount to $4,542.49. Allowing him credit against this for the $1,365 paid at various times to Erle Turner, would leave in his hands a balance of the fund of $3,177.49.

Does he acknowledge this and authorize its payment? Does he in any way direct his executors to pay to these children that paltry sum? On the contrary, he denies all liability to them whatsoever and in his instructions to his executors, speaking of the children, says (Rec., p. 15):

> "Though not a word has been said about it, I thought perhaps after my death, *if they hear of it in time*, some of them might attempt to hold me responsible, and if they should make such an attempt, I hereby authorize and direct my executors to employ the best counsel in the city to defend

> my estate in the district courts and in the Supreme Court of the United States, if it be necessary to appeal the case to that court, and to pay all costs and lawyers' fees out my estate."

And in obedience to this vindictive injunction of this faithless and dishonest trustee the parties are now before this court, after a litigation which has lasted nearly seven years.

IV.

The Defense of Laches Not Sustained by the Record.

The appellees, Ashby and Lunette Turner, were minors when the bill was filed and as to them the bill was brought in their behalf by next friend (Rec., pp. 1, 105), Of course, no claim of laches is made against them, but it is insisted by appellants that the appellees, Erle and Wilmer Turner, are barred by laches and acquiescence.

In determining whether the complainants, Erle and Wilmer Turner, were guilty of such laches as would bar them from relief against Tracy's fraudulent breach of trust, it is important to inquire what was necessary for them to know, what they actually did know, and what their means of knowledge were, and in this connection to consider the situation and condition of the parties.

In ascertaining what was necessary for them to know, it is essential to consider the nature of their cause.

Their claim to relief is based upon Tracy's breach of the trust reposed in him by which he was required to distribute among them the estate of their uncle.

It is strenuously insisted by appellants that Tracy was guilty of no breach of trust and that his payment to the father was valid. The whole case, therefore, depends upon whether Tracy's conduct was wrongful, and that can only be determined upon knowlege of the essential facts

creating a liability in him. The facts that the estate had been bequeathed to the children and had been delivered to Thomas Turner and had been by him squandered evidenced no liability on Tracy's part. If Thomas Turner had been named executor, or had been appointed administrator, *cum testamento annexo*, by the courts of Virginia or of the District of Columbia, the delivery of the estate to him would have been valid, unquestionably.

It is the *peculiar* relations of Tracy to this matter which create his liability. The facts constituting that liability were, according to this record, known to but three persons: Tracy, Tyler, who wrote the statement for Tracy filed with the answer (Rec., p. 15), and Thomas Turner.

Tracy did not inform the appellees of the facts and died in the belief that they were in ignorance of those facts, for he says in his statement (Rec., p. 15):

> "Though *not a word has been said about it*, I thought, perhaps after my death, if *they hear of it in time*, some of them might attempt to hold me responsible."

Tyler didn't inform them, for he testifies concerning the appellees (Rec., p. 299):

"I don't know the people. I wouldn't know them even if I saw them."

The sole source of information, then, was Thomas Turner.

Before the appellees could know or suspect that they had any cause of action against Tracy, it was necessary that they should have known: (1) The terms of the will imposing a trust duty upon Tracy; (2) The fact of Tracy's possession of the estate upon trust under that will; (3) That the delivery to Thomas Turner was not made under such lawful conditions as might well have subsisted and which one would naturally have supposed Tracy

would have *required* to subsist before delivering the fund to him.

The complainants were all born in Minden, La., and lived there until August, 1889, when they were taken to Texas.

Wilmer first came to Virginia in June, 1890, when she was not yet fifteen years old. That summer she met some of the Turner relatives—the Rusts and Sowers families—and stayed at the house of each some weeks. This was the only occasion of her meeting any of them.

She went to boarding school in the country in Virginia, staying four years, and then began teaching, at which she continued till June, 1895. She then went to Texas and visited her parents, leaving there in September, 1896, to resume teaching in Virginia, in which occupation she continued until after the bringing of this suit.

She came of age on the 11th of October, 1896. This claim was first presented to the executors on September 21, 1898, *by counsel retained to prosecute it*, less than two years after she came of age, and the suit was actually filed by her counsel June 10, 1899, less than three years after coming of age.

In September, 1896, when she left Texas to go to Virginia to resume teaching, she went to accept a place which yielded her $100 per annum and her board and lodging, the highest salary she ever received up to the bringing of this suit being $145 per annum and her board and lodging.

In either 1893 or in 1895, when she was yet a minor, Wilmer Turner learned from her mother for the first time that Silas Turner had left his estate to herself and the other appellees.

She never saw the will of Silas Turner (Rec., p. 41).

In September, 1896, while she was yet a minor, and when she was leaving her family, under distressing circumstances, to return to Virginia to accept the place of

teacher at $100 per year, she had her *first and only conversation with her father with respect to this estate.* On that occasion he told her that Tracy had not acted right and that there had been some substitution of notes. He said nothing further and she asked him no question (Rec., p. 42).

Her first information that Tracy had turned over any of the money to her father was obtained in February, 1899, after consulting counsel (Rec., pp. 184-189-190).

Wilmer Turner's first and only communication with Erle Turner on the subject of this estate was in the fall of 1898, after Tracy's death, when she was teaching at Massie's Mills, Nelson County, Va. (Rec., p. 184).

It abundantly appears from the record that Erle Turner did learn, some time in 1891, from Tracy that Silas Turner had left his estate to the appellees, and when Erle learned this from Tracy he supposed at once that the money which he knew his father had been spending was derived from Silas' estate.

But the fact of controlling and overwhelming importance is that none of the facts known to the appellees, nor those not known, but charged to their knowledge in the brief for appellants, had any tendency to indicate culpability or responsibility of any sort *on the part of Tracy.* He had not qualified as executor under the will, and there was nothing in the facts or circumstances brought to the knowledge of the appellees to indicate more than that their father had in some lawful way acquired possession of a part of the estate bequeathed to them and while concealing their rights had unlawfully used it.

Nor is there anything suspicious in the circumstance that almost immediately after Tracy's death claim was made against his estate.

It must be remembered that it stands as an admitted fact in this case that Tracy, from November 30, 1888,

the date of his settlement with Thomas Turner, retained in his possession part of the estate, and continued in possession of it down to the date of his death. In his numerous letters to Erle Turner he acknowledged the possession of trust funds belonging to the estate.

Thus, in his letter of November 20, 1893 (Rec., p. 202), he says:

> "The ground upon which I loaned the estate money and some of mine would not, I fear, bring enough to get us out clear if sold now."

On March 16, 1894 (Rec., p. 202), he writes:

> "I am trying to sell the ground upon which the estate's money and $1,400 of mine is loaned."

On May 8, 1894 (Rec., p. 203), he writes:

> "I have no money in hand belonging to the estate, though I have been trying my best to collect the interest on the notes."

On February 11, 1898 (Rec., p. 206), he writes:

> "I have no money in hand belonging to you or the estate. It is all in the ground. . . . *I am thinking of transferring the whole thing over to the heirs and sending the deed to your mother. Then you can all manage it to suit.*"

Tracy never made the conveyance suggested in this letter.

In all the receipts taken by Tracy from Erle, nine in number, the payments are expressed to be on account of Silas Turner's estate (Rec., pp. 212–13).

On the 14th of September, 1898, Erle Turner wrote to Tracy (Rec., p. 50), and on the 15th of September, 1898, Mr. Darlington replied, stating:

> "Your letter addressed to the late P. A. Tracy, mailed on the 14th instant, has been referred to me, one of his executors. Mr. Tracy died in July last, leaving a last will and testament," etc. (Rec., p. 357).

To which Erle Turner replied by telegram asking if any mention was made of a trust of the S. H. Turner estate (Rec., p. 50), and received a reply from Mr. Darlington, dated September 16, 1898, stating:

> "Mr. Tracy's will does not mention any such trusts as that indicated in your telegram" (Rec., p. 357).

These letters of Tracy and the receipts in the record admitting, within a short time prior to his death, the possession of a part of the trust estate, justified the expectation that Tracy would provide in his will or otherwise for the settlement of the trust funds in his hands, and also required the inquiry made by Erle Turner on learning of his death. Upon finding that there was no provision in his will nor any record among his papers of any liability to the appellees, and knowing from Tracy's letters that his estate was accountable for something, it then became necessary to engage counsel.

Then, for the first time, were the appellees put upon inquiry as to Tracy's conduct, and as a result of that inquiry the text of the will, the list of assets belonging to Silas Turner's estate, the facts that the assets were *in Tracy's possession under the terms of the trust in Silas' will, and that he had unlawfully misapplied the trust fund*, were discovered, and the question of Tracy's liability *for the first time known*.

Tracy confessed to no breach of trust, nor did he or Thomas Turner, or any other person, give to any of the appellees any information that he had been in any respect culpable or negligent, or any cause for suspecting him—the only indications of wrongdoing by anybody, at that time, pointed to *Thomas Turner alone*.

It is admitted that Wilmer Turner, before she came of age, in 1893 or 1895, was told that Silas Turner had left his property to the children. It is also admitted that in

1891 Tracy informed Erle that Silas had left the property to the children, and Erle then supposed that the money which his father had been using came from that estate. But there is not a syllable in the record to show that Erle, or Wilmer, at any time before Tracy's death, knew that Tracy had possession of Silas' estate in trust for them; that Tracy had wrongfully turned it over to Thomas Turner, or that Tracy had any obligation of any sort in the matter beyond whatever remained in his hands, in respect to which he communicated with Erle, and which trust Tracy never repudiated, but pretended to be managing with the utmost care in their interests.

Nor does the record disclose any facts brought to the attention of either Erle or Wilmer which could reasonably have led them to suppose that Tracy had any legal responsibility for the possession of the fund by Thomas Turner and his wrongful use of it.

Neither of them saw the text of the will until after Tracy's death, and then discovered not only that the property was left to the children, which they had previously learned, but also discovered for the first time that *Tracy was made trustee to distribute it among the children and had had the estate in his possession for the purpose.*

These important papers, showing the facts bearing upon Tracy's responsibility, were sent to Erle, in response to his request, made under the advice of counsel, after Tracy's death, and had been in Thomas Turner's possession all the time, locked up in a private repository, Thomas Turner keeping the key.

When there is added, to these facts, the circumstance that these two eldest children were many hundreds of miles away from their parents, and that their father, their natural protector, who had all the information and could have given it to them and from whom, only, they could have obtained it purposely concealed all the facts

from them and was himself a wrongdoer; that they were poor and struggling to maintain themselves, it is unreasonable to expect that they should engage counsel to look into the matter with a view of fastening some responsibility upon Tracy, *whom they had no reason to suspect.*

If the father were the one being sued there might be some justification for the claim of laches in his behalf. Not so as to Tracy.

That the delay in not sooner suing Tracy was neither negligent nor intentional must be manifest. The pecuniary situation of the appellees as shown in the record, their necessities and hardships, were such as to stimulate them to bring action against any one whom they had any reason to believe was their debtor.

Nor can the delay be attributed to any fear of meeting Tracy in life. It is not to be supposed that Tracy, if living, could have offered any other or different defense to their suit than the payment to their father and the facts set up in his instructions to his executors. This statement having been carefully prepared by Tracy in anticipation of a suit with respect to this matter, and for the express purpose of informing his executors as to his defense, must be presumed to represent his sole defense.

If the facts set out in these instructions constitute, as the appellees claim, no defense, they would have been just as inefficient in his lifetime as they are now.

In view of this latter consideration the defense of laches, even if it had a reasonable support under the facts, would not be one to appeal to a court of equity, since it is manifest that the defense of Tracy's estate against this claim is not embarrassed by his death. He has stated his defense, which appellees claim is demurrible in law. It would not be the less so if he were alive and stated it under oath.

Thomas Turner's statements that he made no communication to his children on the subject and gave them no information or explanation, not only stand uncontradicted, but their truth is sustained by the strongest probability.

It would be matter of grave suspicion if Thomas Turner had claimed that he had confessed to his children the wrong he was doing them. He knew that his conduct was culpable while he was expending the money, and when it was all gone and they were reduced to poverty it was most natural that he should have continued his silence.

Thus it is seen that when Erle and Wilmer Turner learned that Silas had left his estate to the appellees there was nothing in that circumstance to cast suspicion upon, or lead to inquiry respecting Tracy's conduct, until after his death, when Erle Turner discovered that Tracy had utterly failed to make any provision, either by will or otherwise, for settling with the appellees the estate which Tracy admitted having in his own hands.

The inquiry thus promptly instituted discovered the full extent of Tracy's responsibility, and this bill was promptly filed.

At page 100 of appellants' brief, two propositions are set forth to which, apparently, great importance is attached. The first is that at the time this suit was brought Wilmer knew her father still had a considerable portion of the estate in his possession, yet never made any complaint or demand upon him. The second proposition is that she knew Turner had sold the farm in Texas, which he had originally purchased with the children's money, and that he had a large part of the money in his possession; yet she would not make objection.

Examination of the portion of the record to which reference is made (Rec., p. 108) will reveal that the substance of her testimony is this: That she had been in-

formed of the fact that her father had some years before lost the farm for default in interest payment; that her father told her "*last week*" that he had subsequently re-acquired the farm and had now sold it and had the money (Rec., p. 188).

She was testifying on May 29, 1901 (Rec., p. 176), *nearly three years after the bringing of this suit*, and the matter had come to her knowledge within a week, while the testimony was being taken in the cause.

The position of appellants is, therefore, that she should have at once abandoned this suit, ratified Tracy's action, and brought suit against her father. It does not seem that this matter needs further discussion.

This whole matter of alleged laches must be determined upon the facts of the case, and inspection of the brief for appellants shows that the claim of laches can only be established by *disregarding*, or holding to be *untrue*, the evidence in behalf of the appellees bearing upon that question. Both the courts below reached the conclusion, from the evidence, that no laches had been shown (Rec., pp. 33, 423-4), and this court is asked to reverse that finding upon a question of the credibility of the witnesses.

The Court of Appeals, in passing upon this question, says (Rec., pp. 423-4):

> "5. There being no doubt of the right of the infants Ashby and Lunette Turner to recover their interest in the trust fund, it remains to inquire whether the adults Erle and Wilmer are barred by reason of their laches.
>
> "Under the circumstances it may be questioned whether the bar of laches can be claimed at all on behalf of Philip A. Tracy, who died in July, 1898, because of any express repudiation of his trust brought directly to the knowledge of these complainants within a proper time before his death.
>
> "But passing that by, we are *clearly of the opinion that there has been no such laches on the*

part of Wilmer Turner as would justify the denial of her recovery of her part of the fund.

"As was said in Pryor *vs.* McIntyre, 7 App. D. C., 417, 430: 'The familiar maxim that 'equity aids the vigilant' is a typical doctrine of equity jurisprudence, and in its application best illustrates the benificent spirit of its administration. The rule is neither arbitrary nor technical, but capable of rigid contraction on the one hand and of wide expansion on the other in the sound discretion of the chancellor, according to the special circumstances of each particular case. The idea is well expressed by Mr. Justice Brewer in the following words: 'The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense controlled by equitable considerations, and the lapse of time must be so great and the relations of the defendant to the rights such that it would be inequitable to permit the plaintiff to now assert them.' Halstead *vs.* Grinnan, 152 U. S., 412, 416." See, also, McIntyre *vs.* Pryor, 173 U. S., 38, 53; Townshend *vs.* Vanderwerker, 160 U. S., 171, 186.

"Applying these principles *to the evidence relating to Erle H. Turner, we are of opinion also that the defense of laches is not maintainable as to him.* The testimony shows that until a short time before the suit was brought he had no definite information of the character and amount of the fund in which he had an interest, *or of Tracy's misfeasance.* Granting that his information was sufficient, under ordinary circumstances, to put him upon inquiry that might have led to full knowledge, *we find enough in the relations between him and Tracy, and in the conduct of the latter, as shown in his letters and the payment of small sums of money, from time to time, to reasonably excuse his failure to prosecute that inquiry.* Nor has the death of Tracy raised

up any special equity on behalf of his estate. No prejudice has accrued therefrom through the loss of any source of material testimony."

V.

The Exceptions to the Auditor's Report and Statement of Account.

The interlocutory decree in the cause referring the case to the auditor to state the account contained these provisions (Rec., p. 26):

> "Third. That this cause be and the same hereby is referred to the auditor of this court to state such account, and that on such accounting the defendants shall be entitled to credit for the sums which it appears from the evidence were paid at various times by the said Tracy in his lifetime to Erle H. Turner, one of the complainants, after said Erle H. Turner had attained his majority.
>
> "Fourth. That for the purpose of stating the account herein directed to be stated and of ascertaining what credits the defendants may be entitled to the auditor is to consider all the testimony in the case bearing on that subject and is authorized to take further testimony, as the parties to this cause may desire, as to the correctness of the allegation of the defendants that the money received by Thomas M. Turner from said Tracy was expended for the benefit of the complainants or any of them, that the expenditures were reasonable for the complainants under the circumstances, and that the said Thomas M. Turner was unable to support the complainants, his children, from his own means."

The auditor proceeded under this reference and made his report, in which he took as the primary basis of charge against Tracy the list of notes given by Tracy to Silas Turner, the owner of the notes (Exhibit Erle H.

Turner No. 22), amounting to $28,972.10, to which he added the profits realized by Tracy (as established by appellants' witnesses) upon the $1,800 invested in the Maryland avenue lots and charged Tracy with interest upon the fund for which he found him accountable from November 30, 1888 (Rec., pp. 374–77).

Under the fourth paragraph of the order of reference (Rec., p. 26), he allowed all the credits claimed by the appellants except three, aggregating $2,460, which are covered by the 10th to 14th exceptions to the auditor's report (Rec., p. 392).

The tenth and eleventh exceptions, covering the claim of $1,200 against Erle Turner, were sustained by the Court of Appeals (Rec., pp. 424-5). The others are not discussed in the brief for appellants, and, it is assumed, are abandoned. The total amount allowed as credit to Tracy's estate, by the auditor and the court below, under the theory of subrogation in the fourth clause of the decree, including the claim of $1,200 and interest, against Erle Turner, exceeds ten thousand dollars.

Under the 10th to the 15th assignments of error (Brf., pp. 101-24), appellants claim that the auditor and the courts below erred in making the primary basis of charge against Tracy the list of notes (Exhibit Erle H. Turner No. 22), amounting to $28,972.10, and in allowing interest against Tracy's estate.

These two objections to the decree below will now be considered.

The Proper Basis of Primary Charge Against Tracy's Estate is the List of Notes Given to Silas Turner by Tracy.

The first objection to the audit is that the auditor erred in charging Tracy, primarily, with the amount of the list of notes, Exhibit Erle H. Turner, No. 22 (Rec., p.

211). This subject has already been discussed in a former part of this brief, and little need be added.

Appellants insist that the list of notes prepared by Tracy, *two months after Silas Turner's death*, is to be accepted as the only evidence of liability on the part of Tracy.

The difficulty with this proposition is that the paper referred to is a self-serving declaration made by Tracy and utterly incompetent as evidence for any purpose except in so far as it is an admission against him.

Thomas Turner, who signed that receipt, was not the legal representative of Silas Turner and could not bind Silas' estate by any admissions. Moreover, he was confessedly without knowledge on the subject. Tracy's instructions to his executors distinctly declare that when he received from Silas Turner, Silas Turner's promissory notes, representing his entire fortune, that Silas retained a list of the notes in his own possession, and Exhibit Erle H. Turner No. 22, used by the auditor as the basis of charge, is that list. It is an itemized receipt for the notes delivered to Tracy and *the only evidence Tracy gave Turner of the property surrendered into his, Tracy's, possession.*

To allow Tracy, after Silas Turner's death, without any evidence of the delivery back to Turner of any of the notes or of any money on account thereof, to substitute for the receipt he had given Silas a receipt concocted by Tracy *after Turner's death*, would be to allow him to destroy the only evidence which Turner had of his entire fortune in the hands of his trustee.

The fact that the notes of Isdell for $1,335.20 were paid on the 23d of May, 1888, and those of Lewis for $1,200 were paid on or about December 8, 1888 (Rec., 358), after Silas' death and after the settlement with Thomas Turner, merely puts upon Tracy the obligation

of accounting for the money instead of the notes, and does not impair the receipt.

It is not contended that, because Tracy said, when the list was shown him, that the notes were "as good as gold," that that admission bound him to any definite amount. The only force of that admission is that he acknowledged genuiness of the receipt written by himself. If all the notes mentioned in said list had been paid off would Tracy have been discharged from liability for the full amount of the principal?

It is submitted that the burden is not cast upon the appellees to *support* the receipt given *by Tracy* to Silas Turner for his property, but the burden is on Tracy to show that it is incorrect, if it be so, in any particular.

Tracy's Estate Was Properly Charged With Interest.

The second objection to the auditor's report is that Tracy was charged with interest upon the money for which he is found accountable. The counsel for appellant say (brief, p. 113) that he should not be so charged, because—

> "first, the beneficiaries of the trust, the appellees herein, have already received substantial benefits from the trust funds; secondly, because Tracy did not retain the trust funds or any part thereof in his possession, and never used it or any part thereof for his own benefit, and was not guilty of any fraud; and, thirdly, because the complainants, by their delay and laches in asserting their claim against Tracy during his life, have lost whatever rights they might otherwise have had to demand interest against his estate."

(1) As to the substantial benefits alleged to have been

received by the appellees, it seems sufficient to say that the full amount of all benefit claimed to have been received by them has, by the auditor's account, already *been charged against them and credited to Tracy's estate.*

The proposition in appellants' brief results in this: that if a part of the corpus of a trust fund has been wrongfully used and the *cestui que trust* has received some benefit from that, then the right to the *income*, which the trust fund would otherwise have yielded but for the wrong of the trustee, is gone. It is submitted that this position is unsound and contrary to the rules applied by equity for the preservation of trust estates and good faith of trustees.

(2) The second proposition is that Tracy *did not retain the trust funds or any part thereof, never used any part for his own benefit, and was guilty of no fraud.*

It has already been clearly shown that Tracy was guilty of fraud and did retain over $6,000 of the trust funds for his own use and benefit. This was found as a fact from the evidence by both the courts below and is one of the grounds upon which the Court of Appeals affirmed the action of the auditor and the court below in charging Tracy with interest. The court says (Rec., p. 424):

> "We find no error in the allowance by the auditor, and its confirmation by the decree, of interest upon the fund in Tracy's hands from November 30, 1888, *when he violated his trust* by paying the bulk of the fund to Thomas M. Turner, *and retaining the remainder, about $6,000, and using it for his own benefit.*"

(3) As to the question of laches, that subject has been already covered in a former part of this brief, and the questions of fact upon which it depends have also

been found against appellants' contentions by both the courts below. It is respectfully submitted that the course of the courts below in charging Tracy's estate with interest was not the imposition of a penalty, but was but the observance of the general rule in equity that a trustee is always accountable for the trust fund and interest and profits, unless some special circumstances exist to justify him and make an exception to the general rule.

In the case of the Manhattan Bank *vs.* Walker, 130 U. S., 267, the bank had received a note of $5,000 and also bonds to the amount of $5,200, property of the plaintiff, as bailee. Thereafter, at the request of the partner of plaintiff's husband, the bank undertook to apply the $5,000 of the note to the settlement of an account due by the firm of the plaintiff's husband and to deliver the $5,200 of bonds to Judah, who hypothecated the same for a loan for the benefit of the firm. The court below charged the bank with the principal and interest of the $5,000 note, but relieved it as to all liability for the $5,200 of bonds. This court reversed that decree, holding that the bank was liable to the plaintiff in having wrongfully parted with the subject of the bailment and was liable for its value and interest, saying (p. 279):

> "It is immaterial in this view whether or not the defendant received any portion of the money loaned by the Bank of Commerce on the security of the bonds."

And the court remanded the cause with directions to enter a decree against the bank for the proper value of the $5,200 of bonds *with proper interest* (p. 280).

See, also—

McLean's Exr. *vs.* Babbitt, 62 N. J. Eq., 753.
Dorsey *vs.* Banks, 70 Md., 508.
Beach on Trustees, secs. 524 and 553.

In this case Tracy not only wrongfully delivered the trust estate to one not entitled to receive it, but in consideration of that wrongful delivery received for his own benefit over six thousand dollars of the trust estate, so that his delivery was not only wrongful, but fraudulent.

It is respectfully submitted that the decree appealed from is correct and should be affirmed,

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